

SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

BETWEEN:

WANDA RER

Appellant

– and –

BESTMONT HOTELS

Respondent

FACTUM FOR APPELLANT

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PART I – OVERVIEW

[1] Copyright protects works that exhibit a sufficient degree of originality to render them original works. Skill and judgment are the two central hallmarks that distinguish an original work from one that lacks originality. This case is about defining the scope of copyright protection with regard to photographs that depict an architectural work and work of artistic craftsmanship. In delineating the confines on copyright protection, this Court must strike the proper balance between protecting artistic works and stifling the creation of new works in the public realm.

[2] The Appellant, Ms. Wanda Rer (“Ms. Rer”), respectfully requests that this Court overturn the finding of the Court of Appeal, which held that the Respondent, Bestmont Hotels (“Bestmont”) did not infringe upon Ms. Rer’s copyright, and in the alternative, that the appropriate quantum of statutory damages is \$15,000. In allowing the appeal, the Trial Court decision should be reinstated.

[3] Copyright subsists in all fifty photographs within Ms. Rer’s photo series, “Façades”. Each photograph is a product of Ms. Rer’s skill and judgment thereby satisfying the required element of originality. Despite Bestmont’s copyright in their marquee and hotel design, Ms. Rer is permitted to use Bestmont’s hotel design and marquee as the subject matter of her expression by s. 32.2(1)(b) of the *Copyright Act*. This provision permits an author to photograph architectural works and works of artistic craftsmanship without copyright infringement arising.

Copyright Act, RSC 1985, c C-42, s 32.2(1)(b).

[4] By reproducing identical and similar copies of Ms. Rer’s photographs without consent, Bestmont infringed upon Ms. Rer’s copyright in each of the fifty works within the Façades photo series. As a result of the substantial infringement, Bestmont’s bad faith, and the commercial nature of the infringement, the maximum quantum of statutory damages (\$20,000 per infringement) should be awarded for each infringement of the fifty works. As such, the total quantum of statutory damages should amount to \$1,000,000.

PART II – STATEMENT OF FACTS

A. Factual Background

[5] Ms. Rer, a Canadian photographer and social media influencer, has travelled the world for almost a decade to photograph millennial style and culture (*Trial*). Recently, Ms. Rer travelled to ten of Bestmont’s luxury hotel destinations across Canada (*Trial*). Ms. Rer was inspired by each hotel’s unique exterior and decided to photograph the hotel design and marquee of each Bestmont location (*Trial*). This photo series is called “Façades” and contains fifty original images (*Trial*).

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

[6] Ten of these original images consist of the “Original Photos” (*Trial*). The photos were taken in front of each hotel at a distance of 100 feet with the marquee centered in the frame (*Trial*). The distance and centering of the marquee was chosen to prominently feature the marquee, while portraying the unique features of each hotel’s exterior (*Trial*).

Trial, *supra* para 5 at para 4.

[7] The remaining forty images, the “Filtered Photos”, were created to enhance the depiction of the hotel design and marquee in the Original Photos (*Trial*). To create the Filtered Photos, Ms. Rer selected and applied the filters Sepia, Oil Painting, Pixilation, and Pencil Drawing to each of the ten Original Photos (*Trial*).

Trial, *supra* para 5 at para 5.

[8] Ms. Rer approached Bestmont to use the Original and Filtered Photos for their marketing at a rate of \$3,000 per image (*Trial*). In good faith, Ms. Rer provided Bestmont with high-resolution copies of all the Original and Filtered Photos to demonstrate the quality of her work (*Trial*). Ms. Rer advised that she was willing to work with Bestmont in applying different filters that suited their marketing objectives (*Trial*).

Trial, *supra* para 5 at para 6.

[9] Bestmont refused Ms. Rer's offer and wrongly accused her of copyright infringement for photographing their hotel design and marquee (*Trial*). Bestmont demanded Ms. Rer to destroy all fifty images within the Façades photo project (*Trial*). However, when Ms. Rer repeatedly asked that Bestmont return her photographs, Bestmont refused to comply with her request (*Trial*).

Trial, supra para 5 at para 7.

[10] Instead of returning the photographs to Ms. Rer, Bestmont reproduced Ms. Rer's Original Photos, along with eleven filtered versions of each photograph (*Trial*). Although Bestmont used a different software to apply the filters, four of the filters were the same ones used by Ms. Rer (*Trial*). Bestmont decorated their guest hallways with these photos without crediting Ms. Rer (*Trial*).

Trial, supra para 5 at para 8.

[11] Ms. Rer demanded that Bestmont remove the unauthorized copies of her photos from their hotel displays (*Trial*). Bestmont ignored this request (*Trial*). In response, Ms. Rer commenced this legal action alleging copyright infringement against Bestmont (*Trial*).

Trial, supra para 5 at paras 9-10.

B. Procedural History

[12] At trial, Lodge J. found that copyright subsists in each of the Original and Filtered Photos. Lodge J. held that Bestmont infringed upon Ms. Rer's copyright in all fifty photographs (*Trial*). The highest range for statutory damages (\$20,000 per infringement) was awarded for each infringement, with the total award amounting to \$1,000,000 (*Trial*). Lodge J. also awarded \$500,000 in punitive damages (*Trial*).

Trial, supra para 5 at paras 16, 18-20.

[13] The Court of Appeal overturned the finding of liability against Bestmont and ruled that Bestmont is immune from Ms. Rer's infringement claims (*Appeal*). Lobi J.A., writing for the Court, held that if any copyright is found, it must only be found to subsist in the collection as a

whole (*Appeal*). With respect to statutory damages, Lobi J.A. found that the total quantum of any award should amount to \$15,000 (*Appeal*).

Rer v Bestmont, 2021 CAIP 333 at paras 2, 5, 9 [*Appeal*].

PART III – POINTS IN ISSUE

[14] The present appeal raises two issues:

1. The Court of Appeal erred in finding that copyright does not subsist in each Façades photograph, and correspondingly, that Bestmont did not infringe upon that copyright.

Copyright should be found to subsist in each photograph within the Façades photo series as each artistic work is original. By reproducing a substantial part of the Façades photographs, Bestmont infringed upon Ms. Rer's copyright.

2. The Court of Appeal erred in reducing the Trial Judge's award of statutory damages.

It should be found that the infringement of Ms. Rer's copyright is commercial in nature. Bestmont's bad faith, coupled with the need to deter infringements of this kind, justify the highest statutory damages for each infringement of every photograph within the Façades series.

PART IV – ARGUMENTS IN BRIEF

ISSUE 1: BESTMONT INFRINGED UPON THE COPYRIGHT IN FAÇADES

A. Each photograph in Façades is an original artistic work that vests copyright protection.

[15] The Court of Appeal erred in concluding that copyright does not subsist in each image within the Façades photo series. As set out below, each Original and Filtered Photo constitutes an original artistic work. As such, copyright must be found to subsist in each of the fifty photos, rather than the series as a whole.

[16] The rights of individuals claiming copyright are set out exclusively in the *Copyright Act*. The *Copyright Act* attempts to balance the public's interest in the dissemination of works and the

reward given to authors for creating original works (*CCH, Théberge*). When granted, copyright strictly protects the expression of ideas in works, not the ideas themselves (*CCH, Moreau*).

CCH Canadian Ltd v Law Society of Upper Canada, 2004 SCC 13 at paras 8, 10 [*CCH*].
Théberge v Galerie d'Art du Petit Champlain inc, 2002 SCC 34 at paras 30-31 [*Théberge*].
Moreau v St Vincent, [1950] 3 DLR 713 at 717, 12 CPR 32 (FC) [*Moreau*].

[17] Section 5(1) of the *Copyright Act* establishes that copyright subsists “in every original literary, dramatic, musical and artistic work” (*Copyright Act*). Relevant to this appeal are artistic works which include photographs, works of artistic craftsmanship, and architectural works (*Copyright Act*). The central limiting factor on whether copyright subsists in any work, including artistic works, is originality. Originality is not defined in the *Copyright Act*; however, this doctrine has been clearly defined by the Supreme Court of Canada.

Copyright Act, supra para 3, ss 2, 5(1).

[18] In *CCH Canadian Ltd. v. Law Society of Upper Canada*, the leading Canadian decision on originality, the Supreme Court of Canada set out that a work is original if it is “more than a mere copy of another work” (*CCH*). While a work does not need to be novel or unique, there must be an exercise of skill and judgment to produce the work that goes beyond a mere mechanical exercise (*CCH*). Skill relates to a creator’s “knowledge, developed aptitude or practised ability” implemented when creating the work (*CCH*). Judgment refers to a creator’s ability to evaluate possible options in order to choose from them (*CCH*). Elements of skill and judgment also arise from an artist’s choice of subject matter, the angle the photograph was taken, lighting, and other matters relating to the photograph’s composition (*Century 21, McKeown*).

CCH, supra para 16 at para 16.
Century 21 Canada Limited Partnership v Rogers Communications Inc, 2011 BCSC 1196 at para 187 [*Century 21*], citing John McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed (Toronto: Carswell, 2003), s 10:11(c) [*McKeown*].

[19] The skill and judgment employed by Ms. Rer to create each of the fifty photographs is more than a mere mechanical exercise and meets the applicable test for originality as set out above.

The Trial Court correctly identified and used the *CCH* test for determining originality to assess the works created by Ms. Rer (*Trial*). When overturning this finding and applying a more stringent standard for originality, the Court of Appeal incorrectly assessed the originality of Ms. Rer's works (*Appeal*). The Court of Appeal's approach set too high of a threshold, and resultingly, improperly characterized Ms. Rer's technique as a purely mechanical exercise.

Trial, supra para 5 at para 15.
Appeal, supra para 13 at para 5.

[20] When the correct standard of originality is applied, copyright will be found to subsist in each of the ten Original Photos. To ensure distractions do not take away focus from the subject of the image, it would be essential for Ms. Rer to consider lighting and camera angles (*Century 21, McKeown*). In making these considerations, she is exercising skill derived from a decades-worth of experience photographing landmarks across the globe (*Trial*). Ms. Rer exercised judgment when evaluating how to best center the subject matter of the photograph such that the unique features of each hotel could be compared (*Trial*). Ultimately, the result of this exercise of skill and judgment to create the Original Photos is ten original artistic works that attract copyright protection.

Century 21, supra para 18 at para 187.
McKeown, supra para 18, s 10:11(c).
Trial, supra para 5 at paras 1, 4.

[21] The Court of Appeal also failed to apply the correct originality test to the Filtered Photos. Lobi J.A. found that there was no element of originality with the chosen filters as Bestmont was able to replicate them. As a result, the Court of Appeal incorrectly held that the skill and judgment exercised by Ms. Rer was insufficient to have copyright vest in the Filtered Photos (*Appeal*).

Appeal, supra para 13 at para 5.

[22] The fact that the filters are not unique or creative is not an applicable consideration for determining originality (*CCH*). The test set out in *CCH* does not require uniqueness or novelty for a work to be original; instead, only an exercise of skill and judgment is needed (*CCH*). The degree

of skill and judgment exercised is also inconsequential to whether originality is found, as long as it is not so trivial as to be a mere mechanical exercise (*CCH*). Ms. Rer drew upon her skill and judgment as an experienced photographer and influencer to choose specific filters to create the Filtered Photos (*Trial*). Each filter was selected to provide an enhanced effect on the depiction of the hotel exterior and marquee (*Trial*). This action goes beyond a mere mechanical exercise as Ms. Rer evaluated various filters and selected only the ones that enhanced her photographs. As such, the forty Filtered Photos are original and should receive copyright protection.

CCH, supra para 16 at para 16.
Trial, supra para 5 at para 5.

B. The *Copyright Act* permits Ms. Rer to photograph Bestmont’s hotels.

a. The Façades photos are not derivative works of Bestmont’s copyright protected works.

[23] The Court of Appeal erroneously conflated subsection 32.2(1)(b) with the foreign doctrine of derivative works (*Appeal*). The United States’ copyright legislation defines derivative works as works based upon pre-existing works that are “recast, transformed, or adapted” (*Théberge, USC*). Not only does the United States’ legislation entitle the copyright holder to control any reproduction of their work, but it also permits the copyright holder to authorize or prohibit any creation of a new derivative work (*Théberge, USC*). As such, rights vest to the copyright holder that permit them to control adaptations of their original work. An example of a derivative work is a motion picture based on a novel or a translation of a novel written in English into French (McKeown).

Appeal, supra para 13 at para 3.
Théberge, supra para 16 at para 70, citing *Copyrights*, 17 USC § 101 [USC].
McKeown, supra para 18, s 4:5.

[24] While derivative works are not explicitly referenced in Canadian copyright legislation, subsection 3(1) of the *Copyright Act* confers the exclusive right onto artists to “produce or

reproduce the work...in any material form whatever” (*Copyright Act*). In the case of *Théberge v. Galerie d’Art du Petit Champlain inc.*, the Supreme Court of Canada discussed the foreign concept of derivative works and held that subsection 3(1) confers on artists the right to control any preparation of derivative works (*Théberge*). The doctrine of derivative works does not apply to the case at bar as the Façades photographs do not recast, transform, or adapt Bestmont’s copyright protected works. Instead, Ms. Rer merely depicted Bestmont’s marquee and hotel design.

Copyright Act, supra para 3, s 3(1).
Théberge, supra para 16 at para 73.

b. Bestmont is not immune from Ms. Rer’s infringement allegations.

[25] The Court of Appeal erred when finding that Bestmont is immune from Ms. Rer’s infringement allegations as owner of the underlying copyright in their hotel design and marquee. Bestmont should be found to have infringed Ms. Rer’s copyright for the following reasons.

[26] First, while the Court of Appeal correctly acknowledged that subsection 32.2(1)(b) confers no right to assert copyright against others, they failed to consider that the provision permits Ms. Rer to photograph architectural works, including Bestmont’s exterior, and works of artistic craftsmanship, such as Bestmont’s marquee (*Appeal, Copyright Act*). The *Copyright Act* permits certain acts to strike a balance between the owners and users of copyright protected works (Vaver). Allowing users to engage in certain acts, without a finding of copyright infringement against them, ensures that the balance is not tipped in favor of copyright owners. Subsection 32.2(1)(b) extends the right to artists to create original works by using certain existing works without any finding of copyright infringement. By photographing the marquee and hotel exterior, Ms. Rer is exercising a right that is permitted by the *Copyright Act*. As such, the Court of Appeal’s immunity finding is contrary to the function of subsection 32.2(1)(b) as this provision grants the right to Ms. Rer to

create original artistic works using Bestmont's pre-existing works. There is no condition on this permitted act that allows Bestmont to later reproduce Ms. Rer's copyright protected works.

Appeal, supra para 13 at para 3.

Copyright Act, supra para 3, s 32.2(1)(b).

David Vaver, *Intellectual Property Law: Copyright, Patents, Trademarks*, 2nd ed (Toronto: Irwin Law, 2011) at 215.

[27] Second, a mere depiction of Bestmont's copyright in Façades is not sufficient to constitute a reproduction of Bestmont's copyright protected works. Copyright only protects the expression of ideas and does not grant a monopoly on the ideas themselves (*CCH, Cinar*). The expression protected by Bestmont's copyright is substantially different from the expression protected in Ms. Rer's photographs. Bestmont carefully designed their hotels to express the authentic experience their destinations provide (*Trial*). As such, the specific combination of features that provide guests with an authentic experience is protected by Bestmont's copyright. The Façades photographs do not copy or reproduce a substantial part of Bestmont's copyright, instead they merely express Ms. Rer's impression of the hotel's unique aesthetic within her own artistic concept.

CCH, supra para 16 at para 8.

Cinar Corporation v Robinson, 2013 SCC 73 at para 24 [*Cinar*].

Trial, supra para 5 at para 2.

[28] Third, permitting Bestmont to reproduce their works in any manner would tip the balance in which copyright law is designed to protect in favor of creators' rights. In *Théberge*, the majority of the Supreme Court of Canada cautioned against providing creators with excessive control:

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain... (*Théberge*)

Ms. Rer's works do not replicate any substantial portion of Bestmont's expression. Instead, Ms. Rer's works only intend to capture the cultural aesthetic that is derived from Bestmont's hotel

design and marquee (*Trial*). Moreover, the ability of the public domain to create original works would be limited if people are restricted from photographing works such as Bestmont's hotel design and marquee. As architectural works and works of artistic craftsmanship are prevalent in public areas, restricting the depiction of such works in photographs would create an obstacle for artists who wish to create new works based off their impressions of these pre-existing works.

Théberge, supra para 16 at para 32.
Trial, supra para 5 at paras 2-4.

[29] Altogether, copyright infringement must not be found when architectural works and works of artistic craftsmanship are depicted in photographs. By granting Ms. Rer copyright protection over the photographs in Façades, Bestmont is not barred from photographing their hotel to create images to decorate their hotel. They can incorporate different angles, lighting, and photo editing, among other techniques, to create original artistic works depicting their hotel. The only action Bestmont is restricted from is reproducing a substantial portion of any image within the Façades photo series, a line that they crossed when reproducing Ms. Rer's photographs.

C. By reproducing all of Ms. Rer's works without authorization, Bestmont infringed the copyright that subsists in each photo of the Façades photo series.

[30] Subsection 27(1) of the *Copyright Act* provides that it is a copyright infringement for any person to do anything that only the copyright owner has the right to do (*Copyright Act*). One of those rights is set out in subsection 3(1) as the right to reproduce their work or any substantial part thereof in any material form (*Copyright Act*). To establish infringement, plaintiffs must prove two elements (*Pyrrha*). First, there must be sufficient similarity between the infringing work and the copyright protected work (*Pyrrha*). This is established by proving a substantial part of the copyright protected work has been reproduced by the infringing work. Second, the infringing work must be derived from the copyright protected work (*Pyrrha*). This element is proven by evidence

of access to the original work.

Copyright Act, supra para 3, ss 27(1), 3(1).
Pyrrha Design Inc v Plum and Posey Inc, 2019 FC 129 at paras 121-22 [*Pyrrha*].

[31] The second element relating to access is established by the fact that Ms. Rer provided Bestmont with high resolution proofs of each of the fifty photographs in the Façades photo series (*Trial*). As such, all that remains to be established is that substantial similarity exists between the Original and Filtered Photos and those reproduced by Bestmont.

Trial, supra para 5 at para 6.

[32] The leading Supreme Court of Canada decision on substantial similarity is *Cinar Corporation v. Robinson*. Determining whether a substantial part of a work has been reproduced is a question of fact that depends on the context of the case at hand. “Substantial part” is not defined in the *Copyright Act*; however, courts have generally held that a substantial part consists of a substantial portion of the creator’s skill and judgment that is exhibited in the creation of the original work (*Cinar*). Courts must look at the original work and infringing work together to assess the cumulative effect of the copied features (*Cinar*). If the cumulative effect of the copied features amounts to a substantial part of the skill and judgment expressed in the original work, infringement will be found (*Cinar*).

Cinar, supra para 27 at paras 26-27, 35-36.

[33] It is important to note that the defendant’s intention is not relevant in the assessment for infringement (McKeown). As such, it is irrelevant that Bestmont did not believe they were infringing Ms. Rer’s copyright when reproducing her works (*Appeal*).

McKeown, *supra* para 18, s 21:1(c).
Appeal, supra para 13 at para 8.

[34] The proper test to be considered is whether the similarities between the works amount to a substantial part of the skill and judgment exercised by Ms. Rer (*Cinar, Pyrrha*). Originality in

the Original Photos is found in the specific combination of (1) the marquee centered in the frame of the photograph, (2) the hotel design being featured in the background, and (3) the photograph being taken from a distance of 100 feet (*Trial*). When comparing the Original Photos and the infringing works as a whole, it is evident that Bestmont copied a substantial portion of the skill and judgment in the Original Photos. The only noticeable difference between the Original Photos and the infringing works are the newly applied filters (*Trial*). This feature is not sufficient to negate a finding that the photographs displayed by Bestmont copy a substantial part of Ms. Rer's skill and judgment in the Original Photos.

Cinar, supra para 27 at para 26.

Pyrrha, supra para 30 at para 132.

Trial, supra para 5 at paras 4, 8.

[35] Comparison of the Filtered Photos against those displayed by Bestmont clearly indicates that Bestmont copied a substantial part of Ms. Rer's skill and judgment. In creating the Filtered Photos, Ms. Rer exercised skill and judgment stemming from years of experience as a photographer and influencer such that her expression in the Original Photos was enhanced (*Trial*). Although a different editing software was used, Bestmont's images still resemble the Filtered Photos as they use filters that create a similar effect. As noted by Lodge J., it is unlikely that Bestmont coincidentally chose filters corresponding to the ones selected by Ms. Rer (*Trial*). Moreover, it is likely that minimal noticeable differences exist between the Filtered Photos and the infringing works using the Sepia, Oil Painting, Pixilation, and Pencil Drawing filters. As such, a substantial part of the skill and judgment in the Filtered Photos has been replicated by Bestmont.

Trial, supra para 5 at paras 5, 8, 19.

[36] The Court of Appeal failed to apply the proper test to determine infringement, and accordingly, their finding on this point cannot stand. Bestmont infringed Ms. Rer's copyright by reproducing a substantial part of the skill and judgment found in the Original and Filtered photos.

ISSUE 2: MAXIMUM QUANTUM OF STATUTORY DAMAGES MUST BE AWARDED

[37] As copyright infringement can be established on the facts, this Court must consider the appropriate quantum of statutory damages Ms. Rer should receive (*Trial*). To do this, the Court must first determine if the infringement has a commercial or non-commercial purpose. If the copyright infringement is in respect of a commercial purpose, the range for damages is \$500 to \$20,000 (*Copyright Act*). If the infringement's purpose is non-commercial, the range is \$100 to \$5,000 (*Copyright Act*).

Trial, supra para 5 at para 9.
Copyright Act, supra para 3, ss 38.1(1)(a-b).

[38] Once the Court determines the purpose of the infringement, it must apply subsection 38.1(5) to determine the appropriate quantum of statutory damages that should be awarded (*Copyright Act*). If the Court finds that there is a commercial purpose for the infringement, then the Court can consider whether subsection 38.1(3) should reduce the quantum of damages (*Copyright Act*). Finally, once the Court determines the appropriate quantum of damages per infringement, it must consider how many infringements occurred (*Copyright Act*).

Copyright Act, supra para 3, ss 38.1(3), 38.1(5).

A. Bestmont's infringement is in respect of a commercial purpose.

[39] Lobi J.A. erred in stating that infringement of a commercial purpose requires a provable gain to Bestmont's business (*Appeal*). In *Mejia v. LaSalle College International Vancouver Inc.*, the British Columbia Supreme Court held that the infringement in that case was of a commercial purpose despite there being no provable revenue to the infringing party (*Mejia*).

Appeal, supra para 13 at para 7.
Mejia v LaSalle College International Vancouver Inc, 2014 BCSC 1559 at paras 214-15 [*Mejia*].

[40] Jurisprudence indicates that infringement of a commercial purpose can be anything that likely furthers the commercial interests of the infringing party. In *Trout Point Lodge Ltd. v.*

Handshoe, the defendant used copyrighted photos to enhance their blog’s reputation (*Trout Point*). In *Trader Corp. v. CarGurus, Inc.*, the defendant used the plaintiff’s copyrighted photos to remain competitive with the plaintiff’s business (*Trader Corp.*). In *Don Hammond Photography Ltd. v. Consignment Studio Inc.*, the defendant used copyrighted photos “to promote its unique culture and line of household furniture” (*Don Hammond*). In each case, the courts found a commercial purpose for infringement because the commercial interests of the defendants were furthered.

Trout Point Lodge Ltd v Handshoe, 2014 NSSC 62 at para 18 [*Trout Point*].

Trader Corp v CarGurus Inc, 2017 ONSC 1841 at para 39 [*Trader Corp.*].

Don Hammond Photography Ltd v Consignment Studio Inc, 2008 ABPC 9 at paras 3, 12 [*Don Hammond*].

[41] The use of Ms. Rer’s photos furthers the commercial interests of Bestmont. Bestmont is a “luxury hotel chain” (*Trial*). Each hotel is “carefully designed and curated” (*Trial*). If Bestmont wishes to improve its ambience by displaying its marquee within the hotels, then it is unlikely that they will adorn their hallways with amateur photographs of their marquee. Instead, they will elect to use professional photographs that match their high-quality interior design. By using Ms. Rer’s carefully created photographs, Bestmont’s commercial interests are furthered because they are using photographs of the marquee that likely complement the hotel chain’s unique design.

Trial, supra para 5 at para 2.

B. The infringement should result in the maximum quantum of statutory damages.

[42] Lobi J.A. correctly found that “statutory damages dispense with the evidentiary burdens of proving loss” (*Appeal*). In determining the appropriate quantum of damages, the Court may consider a list of factors set out in subsection 38.1(5) of the *Copyright Act*. The factors that are relevant in the present case are the good or bad faith of the defendant and the need to deter other infringements of the copyright in question (*Copyright Act*).

Appeal, supra para 13 at para 9.

Copyright Act, supra para 3, ss 38.1(5)(a), 38.1(5)(c).

[43] In relation to bad faith, the instructive case is *Wing v. Van Velthuisen (Wing)*. In *Wing*, the defendant sold copies of the plaintiff's copyrighted diary (*Wing*). Despite receiving a letter from the plaintiff demanding that the defendant stop, the defendant continued to sell (*Wing*).

Wing v Van Velthuisen, [2000] 197 FTR 126 at paras 8-12, [2000] FCJ No 1940 [*Wing*].

[44] In *Wing*, the Federal Court of Canada ("Federal Court") held that the defendant infringed the plaintiff's copyright in bad faith (*Wing*). The defendant published the diary in its entirety (*Wing*). Also, they continued to sell the diary after being warned that their actions infringed the plaintiff's copyright (*Wing*). The defendant's actions were reprehensible the moment they received notice of their infringement because they could no longer claim ignorance of the law (*Wing*).

Wing, supra para 43 at para 74.

[45] The application of *Wing* demonstrates that Bestmont acted in bad faith because they reproduced Ms. Rer's photographs in their entirety (*Trial*). Even though Bestmont used a different software to apply the filters, this Court should find that Ms. Rer's photographs were reproduced in their entirety (*Trial*). Ms. Rer applied certain filters because she was aware of their popularity (*Trial*). The facts do not suggest that the filters' popularity depended on the particular software used. In *Wing*, the Federal Court decided that the diary was reproduced in its entirety even though the defendant had edited the original diary and published it in a book form (*Wing*). This is because the Federal Court understood that this new version of the diary did not change the overall value of the original diary itself. Likewise, the use of a different software does not change the overall value of the Original and Filtered Photos that Ms. Rer provided Bestmont.

Trial, supra para 5 at paras 5, 8.

Wing, supra para 43 at para 10.

[46] Additionally, like the defendant in *Wing*, Bestmont acted in bad faith by continuing to display the photographs despite Ms. Rer's repeated demands that Bestmont return her photographs and stop displaying them (*Trial*). Despite receiving a clear warning that they were infringing on

Ms. Rer's rights, Bestmont continued with their conduct. Bestmont's conduct was reprehensible upon receiving notice because they could no longer claim to be ignorant of Ms. Rer's copyright.

Trial, supra para 5 at paras 7, 9.

[47] The other factor courts should consider in justifying the highest statutory damages is the need to deter certain types of conduct. Case law in Canada suggests that courts not only look at the need to deter the specific defendant's conduct, but also the need to generally deter particular types of infringement. In *Nintendo of America Inc. v. King*, the Federal Court highlighted the importance of using deterrence as a tool to protect the investments made by the creative industry (*Nintendo*). In *Rallysport Direct LLC v. 2424508 Ontario Ltd.*, the Federal Court discussed the need to protect copyright that can be easily infringed using modern technology (*Rallysport*).

Nintendo of America Inc v King, 2017 FC 246 at para 164 [*Nintendo*].

Rallysport Direct LLC v 2424508 Ontario Ltd., 2020 FC 794 at para 42 [*Rallysport*].

[48] These cases demonstrate a need to protect photographers like Ms. Rer from the type of infringement that was committed by Bestmont. First, applying *Nintendo*, there is a need to protect investments made in the creative industry. Ms. Rer spent a year travelling to each of Bestmont's hotels to capture their unique marquees (*Trial*). Without protection for her work, her investment of time and energy will go to waste. Second, applying *Rallysport*, there should be greater deterrence for infringements that are easily accessible through technology. This is particularly relevant to photographers like Ms. Rer that market their photographs by digitally sending high resolution versions of their photographs to potential clients (*Trial*). There is a likelihood that these clients, using modern technology, may infringe on her copyright and easily reproduce her work without giving any attribution to her. To deter this behaviour, higher statutory damages should be awarded.

Trial, supra para 5 at paras 3, 6.

C. The Court should not reduce the award pursuant to subsection 38.1(3).

[49] Lobi J.A. erred in stating that the Trial Judge should have used subsection 38.1(3) to reduce the award (*Appeal*). This subsection authorizes the Court to award less than the statutory minimum for commercial infringements where multiple works are reproduced in a single medium (*Copyright Act*). *Nintendo* clarified that subsection 38.1(3) requires multiple works to exist in a single copied medium (*Nintendo*). Examples of this are newspapers or anthologies, where multiple works can be presented as a collection in one medium (*Nintendo*). In *Nintendo*, the Federal Court held that since each Nintendo game was stored within its own cartridge, rather than a collection of multiple games in one cartridge, a single medium could not be found (*Nintendo*).

Appeal, supra para 13 at para 9.
Copyright Act, supra para 3, s 38.1(3).
Nintendo, supra para 47 at para 148.

[50] In the present case, there is not a single medium in which all the images exist. Instead, Bestmont printed and framed all the photographs separately (*Trial*). Because each image was stored within its own frame, rather than a collection of all the images in a single frame, a single medium does not exist for the images. Therefore, this Court should not apply subsection 38.1(3) to reduce the award.

Trial, supra para 5 at para 8.

D. Copyright subsists in each photograph within the Façades photo series.

[51] The final step after determining the appropriate quantum of damages per infringement is to determine how many infringements occurred. To determine the number of infringements, the Court must consider whether copyright vests in each photo or the whole collection. On this point, the Court of Appeal erred in finding that copyright does not vest in each individual photo (*Appeal*).

Appeal, supra para 13 at para 5.

[52] The Ontario Superior Court of Justice (“Ontario Superior Court”) in *Rains v. Molea* set out the analysis for determining whether copyright vests in the collection or in individual works within the collection (*Rains*). In *Rains*, the plaintiff created a series of over 200 oil paintings based on different white crumpled papers against a dark background (*Rains*).

Rains v Molea, 2013 ONSC 5016 at paras 2, 6 [*Rains*].

[53] First, the Ontario Superior Court rejected the defendant’s argument that copyright vested in the technique used to create the works (*Rains*). On this point, they reasoned that copyright law only protects the expression of the idea and not the idea itself (*Rains*). As such, a painting that expresses an idea may be protected, but the idea underlying the painting cannot (*Rains*).

Rains, supra para 52 at paras 14-15.

[54] Second, the Ontario Superior Court found that copyright vested in each individual painting rather than the whole series (*Rains*). Subsection 2(a) of the *Copyright Act* defines “compilation” to include “a work resulting from the selection or arrangement of...artistic works or of parts thereof” (*Copyright Act*). Applying this to *Rains*, the Ontario Superior Court found no evidence that the plaintiff selected and arranged the paintings in a way that the copyright would vest in the arrangement of the paintings (*Rains*). Rather, the plaintiff simply chose a common theme for his work (*Rains*). Finally, since the plaintiff contemplated adding more paintings to the series, the series was not a “complete independent work of carefully selected paintings” (*Rains*). Therefore, the copyright vested in the individual paintings rather than the whole series.

Copyright Act, supra para 3, s 2(a).

Rains, supra para 52 at para 17.

[55] Lobi J.A. erred in stating that “Ms. Rer only exercised skill and judgment in developing a single concept and technique” (*Appeal*). As mentioned in *Rains*, copyright cannot vest in an idea. Copyright can only vest in the expression of the idea. In the present case, copyright can only vest

in the photographs, not the underlying “concept or technique” in developing the photographs.

Appeal, supra para 13 at para 5.

[56] Application of *Rains* also supports finding copyright in each photo rather than the whole series. Like *Rains*, there is no evidence that Ms. Rer planned to “select or arrange” the photographs in such a way that copyright may only vest in the arrangement of the photographs. The fact that she was willing to sell the photographs individually for \$3,000 shows that she anticipated that the photographs may not remain together (*Trial*). Also, since Ms. Rer anticipated that additional filtered images may be added to her series, her work (at the time she provided the photographs to Bestmont) was not a “complete independent work of carefully selected” photographs (*Trial*). Finally, the common element of the Façades series is the theme of displaying the marquee of the hotel chain prominently in the photographs (*Trial*). The Ontario Superior Court in *Rains* determined that a theme is not sufficient to create a compilation in which copyright may vest.

Trial, supra para 5 at paras 4, 6.

[57] The artist in *Rains* argued that the series as a whole should receive copyright protection on the basis that the compilation evokes a common feeling to all works in the series (*Rains*). The Ontario Superior Court rejected this argument on the basis that a feeling was insufficient to warrant copyright protection in a series as a whole (*Rains*). Moreover, the Ontario Superior Court suggested that extending copyright protection to something intangible and subjective, such as a visual perception of a series of works, would be untenable (*Rains*). This would tip the balance in favor of the creator’s rights by protecting an unarticulated emotion derived from artistic works (*Rains*). Resultingly, the dissemination of works in the public domain would be stifled as new artistic works may infringe a creator’s “self-imposed or critically-bequeathed imprecise evocation of his work’s feeling or expression” (*Rains*).

Rains, supra para 52 at para 18, 22-23.

[58] In a similar manner to the series of works in *Rains*, *Façades* as a compilation allows viewers to compare the unique features of Bestmont’s exterior and marquee. By granting copyright protection to *Façades*, an intangible visual perception of the works would be protected. That being, the ability to compare differences and similarities in the photographs. This has the potential to stifle the creation of artistic works in the public domain. As such, the Court of Appeal’s finding that copyright vests in *Façades* as a whole is too broad and cannot stand.

[59] Altogether, copyright must be found to subsist in each photograph of the *Façades* photo series rather than the collection as a whole. Ms. Rer did not intend for copyright to subsist in *Façades* as a whole as evidenced by her willingness to license each photograph individually and add works to the project. Moreover, it is untenable to protect an intangible visual perception of artistic works such as Ms. Rer’s desire to have the photographs compare the differences and similarities of Bestmont’s hotels across Canada.

PART V – ORDER REQUESTED

[60] The Appellant respectfully requests this Honorable Court to allow the appeal and find that Bestmont has infringed Ms. Rer’s copyright in the Original and Filtered Photos. As a result of Bestmont’s bad faith and the need for deterrence, the maximum quantum of statutory damages should be awarded, with the total quantum amounting to \$1,000,000.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 11th day of January 2022.

Team No. 1
Counsel for the Appellant

PART VI – TABLE OF AUTHORITIES

LEGISLATION: CANADA

Copyright Act, RSC 1985, c C-42.

LEGISLATION: UNITED STATES

Copyrights, 17 USC § 101 [USC].

JURISPRUDENCE

CCH Canadian Ltd v Law Society of Upper Canada, 2004 SCC 13.

Century 21 Canada Limited Partnership v Rogers Communications Inc, 2011 BCSC 1196.

Cinar Corporation v Robinson, 2013 SCC 73.

Don Hammond Photography Ltd v Consignment Studio Inc, 2008 ABPC 9.

Mejia v LaSalle College International Vancouver Inc, 2014 BCSC 1559.

Moreau v St Vincent, [1950] 3 DLR 713 at 717, 12 CPR 32 (FC).

Nintendo of America Inc v King, 2017 FC 246.

Pyrrha Design Inc v Plum and Posey Inc, 2019 FC 129.

Rains v Molea, 2013 ONSC 5016.

Rallysport Direct LLC v 2424508 Ontario Ltd, 2020 FC 794.

Rer v Bestmont Hotels, 21 TCCIPP 1222.

Rer v Bestmont, 2021 CAIP 333.

Théberge v Galerie d'Art du Petit Champlain inc, 2002 SCC 34.

Trader Corp v CarGurus Inc, 2017 ONSC 1841.

Trout Point Lodge Ltd v Handshoe, 2014 NSSC 62.

Wing v Van Velthuisen, [2000] 197 FTR 126, [2000] FCJ No 1940.

SECONDARY MATERIALS

McKeown, John, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed (Toronto: Carswell, 2003).

Vaver, David, *Intellectual Property Law: Copyright, Patents, Trademarks*, 2nd ed (Toronto: Irwin Law, 2011) at 215.

PART VII – APPENDICIES

Appendix A – *Copyright Act*

Section 2: Definitions

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

artistic work includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works; (*oeuvre artistique*)

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)

Section 3(1) 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...

Section 5(1) Conditions for subsistence of copyright

5 (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met...

Section 27(1) Infringement generally

27 (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

Section 32.2(1)(b) 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;

Section 38.1(1) 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.

Section 38.1(3) Special Case When Damages May be Reduced

38.1(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.

Section 38.1(5) Factors to Consider for Quantum of Statutory Damages

38.1(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.