

IN THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

BETWEEN:

WANDA RER

Appellant

- and -

BESTMONT HOTELS

Respondent

FACTUM FOR THE APPELLANT

(2021 – 2022 Harold G. Fox Intellectual Property Moot)

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PART I: OVERVIEW

[1] Canada’s copyright regime was designed to balance the rights and interests of creators with those of the public. Its purpose is to incentivise both the creation and dissemination of original works. This balance can only be achieved when creators receive just compensation and recognition for their efforts, and the public can benefit from their creations. To give purpose to the meaning of Canada’s *Copyright Act*, the rights inherent in artists’ work must be protected and enforced.

[2] The Appellant, Ms. Wanda Rer (“Ms. Rer”), commenced a copyright claim against the Respondent, Bestmont Hotels (“Bestmont”), for the infringements of her “Façade” photo-project and the individual images that comprise it. These infringements include reproductions of the ten original photos, production of colourable imitations of her forty filtered photos, and reproductions of the compiled photo-project as a whole.

[3] Ms. Rer is a Canadian photographer and social media influencer. She has been steadily building her brand and reputation through producing and procuring her images in the public and private spheres. Ms. Rer is the photographer and creator of the “Façade” project, which highlights and contrasts each of the ten Bestmont Hotel exteriors.

[4] The Trial Judge, Lodge J, correctly recognized Ms. Rer’s copyright in each original and filtered photo, and appropriately found that Bestmont’s reproductions and colourable imitations of them constituted copyright infringements.

[5] Further, the assessment of statutory and punitive damages at Trial was just. Lodge J correctly identified and weighed the relevant factors: the extent and the commercial purpose of the infringements; Bestmont’s bad faith and unreasonable conduct; and the pressing need for deterrence against future infringements of digital works by sophisticated parties of this kind.

[6] This appeal should therefore be allowed, and the Trial decision should be restored.

PART II: STATEMENT OF FACTS

[7] Ms. Rer is a Canadian artist, photographer, and social media influencer with a substantial following. Bestmont is a luxury hotel chain, well-known for its red marquee and the “authentic [destination] experience” it offers at each of its ten locations across Canada.

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

[8] Ms. Rer created the “Façade” project. It is a compilation of ten original photos, one of each Bestmont hotel, and forty filtered photos made using four styles to redesign the originals. She used her skill and judgment, as a photographer, in selecting the specific aesthetic parameters to use when capturing the images, to showcase each hotel’s marquee and architectural design features.

Trial, supra para 7 at para 3-4.

[9] Ms. Rer drew from her expertise as a successful social media influencer in editing each original photo, by using select filters she knew to be trending and popular in order to elicit a positive market response. The filters used were “sepia,” “oil painting,” “pixilation,” and “pencil drawing.”

Trial, supra para 7 at para 5.

[10] Ms. Rer then offered to licence the Façade project to Bestmont, for marketing purposes, at \$3,000 per photo. To demonstrate the quality of her images, she provided the hotel with high-resolution digital copies. Ms. Rer’s reasonable expectation in sending the photos, given the nature of the photography industry, was that they would not be used without her consent or compensation.

Trial, supra para 7 at para 6.

[11] Bestmont made it clear that not only was it uninterested in Ms. Rer’s offer, but that it believed her photographs infringed its own registered copyright in the marquee and hotel designs. Bestmont was adamant that Ms. Rer destroy her copies of the photos in her Façade project and refused to return the electronic copies that she had presented to it, in good faith, when she made her offer.

Trial, supra para 7 at para 7.

[12] Bestmont incorrectly assumed it had the right to reproduce Ms. Rer's images; it used the ten original Façade photographs to decorate its hotel interiors, while giving no attribution to Ms. Rer, the original author of the images, whatsoever. Further, using a different photo-editing software, Bestmont applied virtually identical filters to each original photo, including "sepia," "oil painting," "pixilation," and "pencil drawing," thereby replicating Ms. Rer's filtered images. These replications, in addition to further filtered reproductions, were also used in Bestmont's hotel displays.

Trial, supra para 7 at para 8.

[13] When Ms. Rer learned of the unauthorized displays, she immediately contacted Bestmont and demanded that they be removed. She received no reply. The photos were not removed. This noncompliance forced her to file a copyright infringement claim against Bestmont in order to protect her rights of reproduction. Despite being aware from the outset of Ms. Rer's claim to the copyright in her images, Bestmont only removed the photos right before trial. It kept the photos on display in its hotels for months despite being alerted to the copyright issue in them.

Trial, supra para 7 at paras 9-10.

[14] Justice Lodge, of the Trial Court of Canada – Intellectual Property Division, correctly found that Bestmont infringed Ms. Rer's copyright in her original and filtered photos for a commercial purpose. Statutory damages of \$1,000,000 were awarded pursuant to s. 38.1(1)(a) of the *Copyright Act*, in addition to \$500,000 in punitive damages.

Trial, supra para 7 at paras 19-21.

[15] On appeal, Lobi JA, for the Court, held that Ms. Rer did not hold copyright in her fifty photos and that, consequently, there was no copyright infringement by Bestmont. The Court further stated that the \$1,500,000 award on Trial was grossly disproportionate to the infringement, and that, if there had been an infringement, a total award of \$15,000 would have been more appropriate.

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

PART III: POINTS IN ISSUE

[16] There are two issues on appeal:

ISSUE ONE: Bestmont infringed on Ms. Rer’s copyright in her photographs.

ISSUE TWO: Ms. Rer is entitled to statutory and punitive damages.

PART IV: ARGUMENTS IN BRIEF

ISSUE ONE: Bestmont infringed on Ms. Rer’s copyright in her photographs.

A. Ms. Rer’s photographs do not infringe Bestmont’s copyright

[17] Ms. Rer did not infringe Bestmont’s copyright when taking her photographs, pursuant to s. 32.2(1)(b) of the *Copyright Act* (“the *Act*”). This provision allowed her to freely photograph the hotels and marquee, as they are public and permanently situated, or architectural, pieces of work.

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

[18] Bestmont registered copyright in its hotel designs and marquee, and is therefore presumed to hold copyright in them pursuant to s. 53(2) of the *Act*. However, according to s. 32.2(1)(b) of the *Act*, it is not an infringement of copyright for any person to reproduce in a photograph “an architectural work,” or “a sculpture or work of artistic craftsmanship [...] that is permanently situated in a public place or building.” Notably, despite the statement made by Lodge J, there is no requirement that a work be a “derivative work” to benefit from this statutory exception.

Copyright Act, *supra* para 17, ss 53(2), 32.2(1)(b).
Théberge v Galerie d’Art du Petit Champlain Inc, 2002 SCC 34 at para 71 [*Théberge*].

[19] While Ms. Rer’s photographs featured the hotel and marquee, the hotel is indisputably an architectural work, as defined in *Corocord Raumnetz* as “any building or structure or any model of a building or structure.” Further, courts have recognized that a “building” is not only the shell, but also additional design elements of the building.

Corocord Raumnetz GMBH v Dynamo Industries Inc, 2016 FC 1369 at para 82 [*Corocord Raumnetz*].
Commission de la construction du Québec v 9125-5273 Québec Inc, 2014 QCCS 1303 at para 61.

[20] If the marquee is not, as we argue, part of the hotel exterior, then it ought to be treated as a sculpture permanently situated in a public place, on the exterior of the hotel. Although the hotel is privately owned, the nature of hotel exteriors and common areas is such that the public has access to them, as per the standard definition of “public.” By precluding Ms. Rer from holding copyright in her images of the hotel and marquee, a public place, the court would fail to give effect to s. 32.2(1)(b).

Merriam-Webster Dictionary, sub verbo “public.” accessed January 11, 2022 <www.merriam-webster.com>. *Copyright Act*, *supra* para 17, s 32.2(1)(b). *Canadian Admiral Corp v Rediffusion Inc*, 1954 CarswellNat 5 at para 69, [1954] Ex CR 382 [*Admiral Corp*]. *R v Moreau*, 1995 CarswellQue 350 at para 21, [1995] RJQ 1809 [*Moreau*].

B. Ms. Rer holds copyright in her original and filtered photos

i) The original photographs are subject to copyright protection

[21] The ten original photographs taken by Ms. Rer are subject to copyright protection. Ms. Rer necessarily exercised skill and judgement in taking the photographs through, among other things, the selection of angles, subject matter, lighting, and equipment. She made each selection in the artistic process in her capacity as a professional photographer, with almost a decade of experience, and with a marketing concept in mind.

[22] The *Act* provides three conditions that must be met for Ms. Rer to hold copyright in each of her original photos pursuant to s. 5(1)(a) of the *Act*. First, the photographs must be included in the list of works in which copyright will subsist. Second, they must be original. Third, Ms. Rer must be either a citizen, subject of, or a person ordinarily resident in, a treaty country. The *Act*, in s. 34.1(1)(b), presumes that copyright lies with the author of the work.

Copyright Act, *supra* para 17, ss 5(1)(a), 34.1(1)(b).

[23] Photographs are included in the definition of “artistic work” under s. 5(1) of the *Act*. When applying the definition of an “artistic work,” it is not necessary for courts to “evaluate the artistic or aesthetic nature of a photograph.” In the past, Canadian courts have found simple and repetitive

photographs of automobiles, automotive parts and accessories, and real estate properties to be copyrightable, demonstrating the low threshold of eligibility for copyright of photographs.

Trader Corp v CarGurus Inc, 2017 ONSC 1841 at paras 22-23 [*Trader Corp*].

Rallysport Direct LLC v 2424508 Ontario Ltd, 2019 FC 1524 at para 48 [*Rallysport 2019*].

Century 21 Canada Ltd Partnership v Rogers Communications Inc, 2011 BCSC 1196 at para 185 [*Century 21*].

[24] For a work to be original, it must be “more than a mere copy of another work.” While it need not be creative, it requires the exercise of skill and judgement by the author. Skill requires the use of knowledge or a developed or practiced aptitude to produce the work, whereas judgement requires the exercise of opinion, evaluation, or discernment to compare options in the creation of the work.

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

Patterned Concrete Mississauga Inc v Bomanite Toronto Ltd, 2021 FC 314 at para 22 [*Patterned Concrete*].

[25] There is consensus among courts that photographers exercise skill and judgement when taking a photograph, as a result of training and practice. In *Century 21*, Punnett J emphasized the act of choosing subject matter, angle, or other parameters, as sufficient to meet the requirement.

Rallysport 2019, *supra* para 23 at paras 46-48.

Thomson v Afterlife Network Inc, 2019 FC 545 at para 34 [*Afterlife Network*].

Century 21, *supra* para 23 at paras 185-187.

Trader Corp, *supra* para 23 at paras 23-26.

[26] Lobi JA erred by saying that “mechanically repeating the same concept over and over at different hotels ought not to justify copyright in each resulting photograph.” *Trader Corp* specifically articulates that standardized procedures do not eliminate the use of skill and judgement by a photographer, nor do they “reduce the exercise of taking the photos to a simple mechanical exercise.”

Appeal, *supra* para 15 at para 5.

Trader Corp, *supra* para 23 at para 24.

[27] The photos in *Trader Corp*, a result of standardized procedures, while simple and lacking artistry, were subject to copyright protection. Accordingly, Ms. Rer’s photographs, the products of a deliberate and laborious creative process, ought to be protected as artistic works as well.

Trader Corp, *supra* para 23 at para 24.

[28] Moreover, copyright is a creature of statute, and Parliament was intentional in their omission of derivative works from the *Act*. As noted by the Supreme Court in *Théberge*, derivative works is a foreign concept and does not form a part of the Canadian copyright regime.

CCH Canadian, *supra* para 24 at para 9.

Théberge, *supra* para 18 at para 71.

Wiseau Studio, LLC et al v Harper et al, 2020 ONSC 2504 at para 149 [*Wiseau*].

Berne Convention for the Protection of Literary and Artistic Works, WIPO (1982, Geneva) [*Berne Convention*].

[29] Finally, Ms. Rer is a Canadian citizen. Having satisfied all three conditions, copyright subsists in each of the ten original photographs taken by Ms. Rer. Further, under s. 13(1) of the *Act*, Ms. Rer, as the author of the work, is the owner of the copyright. Therefore, per s. 3(1) of the *Act*, Ms. Rer has unfettered rights to reproduction and publication of her photographs.

Copyright Act, *supra* para 17, ss 13(1), 3(1).

ii) The filtered photographs are subject to copyright protection

[30] The filtered photographs meet the requirements outlined in s. 5(1) of the *Act*, as they are original, artistic works, created by Ms. Rer, a Canadian citizen.

Copyright Act, *supra* para 17, s 5(1)(a).

CCH Canadian, *supra* para 24 at para 16.

[31] The filtered photographs are artistic works, as per the definition in s. 2 of the *Act*. Photography is on a spectrum of artistic expression that includes filters and modifications and, in many cases, the camera is just one tool in the creation of art. A single photo can create, through digital alterations and edits, multiple unique and original works, each with distinct qualities.

Copyright Act, *supra* para 17, s 2.

Dona Schwartz, "Camera Clubs and Fine Art Photography: The Social Construction of an Elite Code," *Urban Life* 15:2 (1986) 165 at 171-172.

Nadene Nel, *Fine Art Photography* (thesis, 2005), Central University of Technology, Free State at 1.

[32] To understand the world as it is today, we must understand the "ubiquity of digital communications and social media," and how the photos we create help shape this media. Social media promotes and facilitates our online image-sharing culture, creating a space for photography

that is more conversational and expressive than ever before. The protection of these expressions falls directly in line with the preamble of the *Copyright Modernization Act*, which emphasizes the promotion of “culture and innovation, and investment in the Canadian Economy.”

Wei-Tse Sun et al, “Photo Filter Recommendation by Category-Aware Aesthetic Learning” (2017) 19:8 IEEE Transactions on Multimedia 1870 at 1870.
Nathan Jurgenson, *The Social Photo: On Photography and Social Media*, (Verso, 2019) at 21.
Copyright Modernization Act, SC 2012, c 20, Preamble.

[33] In this case, the application of the filters to the photographs captures the *expression of an idea*, as intended by Ms. Rer, and, therefore, is subject to copyright protection.

[34] *Datafile Ltd* emphasized that a work that is “substantially derived from pre-existing material” can meet the requirement of copyright “if sufficient skill and judgement” were used in its creation. Ms. Rer exercised both in the composition of each photo by selecting each specific parameter, from filter, to content, to execution, with the intention to provoke a response by viewers.

DRG Inc v Datafile Ltd, 1987 CarswellNat 765 at para 23, [1988] 2 FC 243 [*Datafile Ltd*].

[35] On appeal, Lobi JA described the “infinitesimal amount of originality involved” in the creation of the filtered photos, stating that there was “nothing original about the filters chosen and applied.” This suggests that originality requires creativity or uniqueness, which goes beyond the appropriate test for originality, and is inconsistent with *CCH Canadian*.

Appeal, *supra* para 15 at para 5.
The Toronto Real Estate Board v Commissioner of Competition, 2017 FCA 236 at para 192 [*Toronto*].
CCH Canadian, *supra* para 24 at para 16.

[36] In *Capitale en fête*, the Court articulated that the creation of cropped photographs was not the result of a “simple mechanical operation,” but rather that the work required the author’s “mastery of the necessary technical and aesthetic parameters.” There, the mixture of elements ranging from what software to use, the appropriate tools, talent, and judgement, all acquired from experience, brought this work of cropping photographs into the realm of copyright protection.

Capitale en fête Inc v Ouellet, 2019 QCCQ 2607 at para 58 [*Capitale en fête*].

[37] While the selection of a filter may seem mundane to those unfamiliar with digital media, the reality of social media is that there is a wide variety of styles of filters to choose from. Further, their use and popularity are constantly in flux with fast moving trends that are difficult to successfully appreciate and maneuver unless consistently engaged with these developments in the way that digital influencers are. Accordingly, as a social media influencer, Ms. Rer is trained to critically evaluate the array of filters and editing services available to her, and how best to pair them with her images.

Sun, *supra* para 32 at 1870.

[38] In the same vein, Ms. Rer did not randomly select filters for the photos in the Façade project; she selected them with a particular marketing strategy for Bestmont in mind, requiring knowledge of the technical and aesthetic parameters of photo-editing. Driven by experience as an influencer, Ms. Rer used her expertise to strategically choose filters that would be in line with current trends, so as to enhance and compliment the distinct features within her photographs. This act required Ms. Rer to critically evaluate the filters and photo-editing software readily available to her, indicating the use of judgement in the creation of the work. Here, just as described in *Capitale en fête*, it is “a mixture of elements” that make it possible to obtain the desired result in the filtered photos.

Capitale en fête, *supra* para 36 at para 58.

[39] The terms of the *Act* are not frozen in time; built into them is the recognition of the ebb and flow of technology and art. The scope of copyright protection must adapt to the changing perceptions and realities of expressive creation as they occur. As Jurgenson describes, to only apply “traditional aesthetics” to filtered photos is “to disrespect the integrity of vision of those making and seeing the images,” and fails to give meaning to an emerging form of expression. To meet this evolving cultural shift to online image-based sharing, it is imperative for the *Act* to capture this new expression.

Jurgenson, *supra* para 32 at 12.

Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36 at para 43 [SOCAN].

C. Bestmont infringed Ms. Rer’s copyright in the compiled “Façade” project

[40] Copyright subsists in the Façade project as a compilation, in addition to the individual photographs, pursuant to ss. 2.1(1) and 2.1(2). Ms. Rer exercised skill and judgement inherent to the creation of a photo-project in the selection of the subject matter and parameters of the photographs and in the arrangement of the final work, in a manner that allowed for direct comparison between each hotel, to communicate a unique visual experience to viewers.

Copyright Act, supra para 17, ss 2.1(1), 2.1(2).
Neudorf v Netzwerk Productions Ltd, 1999 CarswellBC 2774 at para 2, [1999] BCJ No 2831.

[41] As author of the work, Ms. Rer has presumed ownership of the copyright in the compilation. Pursuant to s. 27(1) it is an infringement to reproduce her work, which Bestmont did.

Copyright Act, supra para 17, ss 13.1, 27(1).

D. Bestmont infringed Ms. Rer’s copyright in each photo by reproducing them

i) Bestmont infringed on Ms. Rer’s copyright in her original photographs

[42] Bestmont infringed Ms. Rer’s copyright in each original photo when it reproduced them in its hotels. The right to reproduce a work is granted to the copyright holder in s. 3(1)(a) of the *Act*. Therefore, without Ms. Rer’s explicit consent, any reproduction of her work constitutes an infringement.

[43] Bestmont conceded that it reproduced the original photos and displayed them in its hotels. Therefore, as outlined in s. 27 of the *Act*, Bestmont infringed on Ms. Rer’s copyright in the photos.

Copyright Act, supra para 17, ss 27(1)-(2).

ii) Bestmont infringed on Ms. Rer’s copyright in her filtered photographs

[44] Given that Ms. Rer holds copyright in the filtered images, Bestmont infringed on her copyright by applying the same four filter styles used by Ms. Rer, making a “colourable imitation” of her work, as described in s. 2 of the *Act*. While the *Act* does not go so far as to give authors

monopoly over ideas or elements of their work, it does protect the *expression* of ideas in works, and infringement occurs when that expression is taken without authority.

Copyright Act, supra para 17, s 2.
CCH Canadian, supra para 24 at para 8.

[45] A colourable imitation reproduces, at least, a substantial or important part of the work. Whether a colourable imitation has taken place requires consideration of two elements: substantial similarity, and access. Similarity depends on whether there is “sufficient similarity between the infringing work and the copyright work or of a substantial part of the copyright work.” Access is required to prove “that the copyright work is the source for the infringing work.” Where there is sufficient similarity and access, there is a *prima facie* case of infringement.

Lainco Inc v Commission Scolair de Bois-Francs, 2017 FC 825 at para 134 [*Lainco*].
Pyrrha Design Inc v Plum and Posey Inc, 2019 FC 129 at paras 121-122 [*Pyrrha*].

[46] *Robinson* elaborated on the notion of “substantial similarity,” stating that it is a flexible one, to be determined on a matter of “fact and degree,” of quality rather than quantity.

Robinson v Cinar Films Inc, 2011 QCCA 1361 at para 66 [*Robinson*].
Lainco, supra para 45 at para 134.

[47] The Supreme Court in *Cinar* noted, “a substantial part of a work is a part of the work that represents a substantial portion of the author’s skill and judgement expressed therein.” To this effect, in the way a novel may be reproduced in substantial part without a single sentence being copied, Ms. Rer’s filtered photos may still be reproduced in substantial part without reproducing the *actual* photographs. To determine whether Bestmont copied a substantial part of Ms. Rer’s skill and judgement, represented in her work, one need only look at the elements of the two works to compare features, considering “the protected work as a whole.”

Cinar Corporation v Robinson, 2013 SCC 73 at para 26 [*Cinar*].
Ladbroke (Football) Ltd v William Hill (Football) Ltd, [1964] 1 WLR 273, [1964] 1 All ER 465 (UKHL), at 550 [*Ladbroke*].
Designers Guild Ltd v Russell Williams (Textiles) Ltd, [2000] WLR 2416, [2001] 1 All ER 700 (UKHL), at para 69 [*Designers*].
Pyrrha, supra para 45 at para 127.

[48] Bestmont’s application of the four similar filters was not coincidental. Bestmont relied on Ms. Rer’s expertise and knowledge when using the photos within her Façade project to help select the filters for the photographs it later exhibited in its hotels. In doing so, it took her *expression* and reproduced it in its own work. To the ordinary eye, the photographs appear the same as the copyrighted work, in both content and format. While there may be subtle differences in the final images due to the use of different photo-editing software, the Ontario Superior Court in *Sullivan* noted that, even where copied features have been altered such that they are notably different from the original work, the copying may still constitute a “substantial part of a work.”

Sullivan v Northwood Media Inc, 2019 ONSC 9 at para 44 [*Sullivan*].
Pyrrha, *supra* para 45 at para 129.

[49] After having retained access to the filtered images in its dealings with Mr. Rer, Bestmont knowingly and intentionally copied the work of Ms. Rer to save time and effort, piggybacking off her labour. It did so after Ms. Rer explicitly requested the return of her images.

Equustek Solutions Inc v Jack, 2020 BCSC 793 at para 286 [*Equustek Solutions*].

[50] The causal connection between the substantial similarity of Bestmont’s reproductions with simultaneous access to Ms. Rer’s filtered photographs suggests Bestmont’s images are a “colourable imitation” of Ms. Rer’s work. Therefore, these reproductions constitute copyright infringement.

ISSUE TWO: Ms. Rer is entitled to statutory and punitive damages.

A. Bestmont’s infringement was for a commercial purpose

[51] Bestmont used the infringed photos for a commercial purpose by displaying them across its ten hotels. The photos improved the atmosphere and appearance of its hotels, which contributes to the overall *experience* of its patrons. For luxury-brand hotels, this is an essential element of the service they provide.

i) Bestmont's use was to improve the service it provides to paying patrons

[52] Luxury hotels, like Bestmont, go beyond providing the practical service of simply renting a room—they provide an experience. Their target clientele are those with the means to demand and afford luxury. To meet those expectations, a hotel's services and appearance must *reflect* luxury. As such, changes to the style or appearance of a luxury hotel are not done frivolously.

[53] Bestmont has a reputation to uphold. As noted at Trial, each of Bestmont's hotels "is *carefully* designed and *curated* to provide guests with an authentic *experience*." It follows that the decision to display Ms. Rer's high-quality and original artistic works must have been made with care, in view of contributing to that authentic experience.

Trial, supra para 7 at para 2 [emphasis added].

ii) "Commercial purposes" do not require evidence of profits or advantage

[54] The Appeal Judge erred in finding that without evidence of an increase in revenue or obvious business advantage from the infringement, there could be no commercial purpose. A commercial purpose encompasses more than just strictly profit-generating activities, and can be found even when specific evidence of damages or profits cannot be produced.

Appeal, supra para 15 at para 7.

[55] Bestmont's use of the photos falls within the scope of a commercial purpose in s. 38.1(1)(a). Case law has demonstrated that "commercial" purposes include improvements to reputation, product appeal, or the customer's post-sale experience of a product. Bestmont's use of the infringed photos can be described by each of these headings. By displaying the art, it sought to improve patrons' post-sale experience of its hotels by adding to the luxury experience it offers, thereby bolstering its reputation as a luxury brand, and adding to its appeal for its target clientele.

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

Rallysport 2019, supra para 23 at para 48.

Rallysport Direct LLC v 2424508 Ontario Ltd, 2020 FC 794 at para 3 [*Rallysport 2020*].

Patterned Concrete, supra para 24 at paras 23, 70.

[56] Additionally, s. 38.1(1) explicitly states that the provision can be elected in *lieu* of the damages and profits referred to in s. 35(1), which do require proof of profits pursuant to s. 35(2).

Copyright Act, supra para 17, ss 38.1(1), 35(1)-(2).
Patterned Concrete, supra para 24 at para 70.

B. Bestmont had reasonable grounds to believe Ms. Rer had copyright

[57] Bestmont should not be able to benefit from s. 38.1(2). It is a sophisticated party with the means of verifying whether it had the right to use Ms. Rer’s images, which it clearly did not. Subsection 38.1(2) can only reduce damages where the defendant proves it was not aware, and had *no reasonable grounds* to believe, it had infringed copyright. Bestmont did have reasonable grounds to believe it infringed Ms. Rer’s copyright, and thus the provision should not be applied.

Airbus Helicopters, SAS v Bell Helicopter Textron Canada Ltée, 2017 FC 170 at para 409 [*Airbus*].
Copyright Act, supra para 17, s 38.1(2).
Nicholas v Environmental Systems (International) Ltd, 2010 FC 741 at para 104 [*Nicholas*].

[58] As articulated in *Mejia*, it is “disingenuous” to assert s. 38.1(2) where an artist, like Ms. Rer, clearly views themselves as the rightful owner of the copyright. By offering Bestmont the opportunity to license her photos, Ms. Rer presented herself as the artist and rightful copyright holder. Bestmont should, and certainly could, have sought legal advice to inform its own position, then, *before* brazenly using the photos without consent. But Bestmont has produced no evidence that it did so, despite the fact that such evidence would support the application of s. 38.1(2).

Mejia v LaSalle College International Vancouver Inc, 2014 BCSC 1559 at para 217 [*Mejia*].

[59] Despite being a sophisticated party with both a demonstrated awareness of copyright law through its own use of copyright registration, *and* more than sufficient resources to access legal counsel for advice, there is no evidence that Bestmont conducted due diligence before using the photos. The onus is on a defendant to “ensure that [it does] not infringe.” This onus was not met.

CHUM Ltd v Stempowicz, 2003 FCT 800 at para 44 [*CHUM*].
Airbus, supra para 57 at para 409.
Patterned Concrete, supra para 24 at paras 51, 64.
Rallysport 2020, supra para 55 at para 37.

C. The minimum damages would not be in gross disproportion for being too high

[60] Ms. Rer's collection of fifty photos is not large enough to warrant a reduction of damages pursuant to s. 38.1(3). Even if damages were assessed at \$500 per photo, a price well below their value, the total, \$25,000, would not come close to reflecting the fair market value of Ms. Rer's collection. This sum is not grossly disproportionate to Bestmont's infringement. As such, the gross disproportionality requirement of s. 38.1(3)(b) is not met, and the provision should not be applied.

Copyright Act, supra para 17, s 38.1(3).

[61] Section 38.1(3) has largely been applied only where hundreds or thousands of photos had been infringed, or where the assigned price or production costs of the images were in the evidence and the minimum award would clearly exceed that amount. In the case at bar, there are only fifty photos, and the fair market price assessed by Ms. Rer was well above the minimum award.

Rallysport 2020, supra para 55 at paras 5, 43.

Century 21, supra para 23 at paras 422, 426.

Trader Corp, supra para 23 at paras 29, 67.

Don Hammond Photography Ltd v Consignment Studio Inc, 2008 ABPC 9 at paras 4, 16 [*Don Hammond*].

[62] Copyright law attempts to achieve a balance between incentivizing creators and promoting public access to works. To uphold this balance, courts must ensure that creators are justly rewarded by not undermining their ability to sell their works at a fair price.

Théberge, supra para 18 at paras 30-31.

[63] Ms. Rer is an industry professional, and has assessed the fair market value of her photos to be \$3,000 per work. Her expertise as a professional photographer, who is able to accurately assess the market value of her images, should be recognized. To award damages below the statutory minimum of \$500 per work would thus not justly compensate her for Bestmont's infringements.

[64] As there is not a vast collection of infringed works in this case to otherwise warrant the damages reduced, applying s. 38.1(3) would render the cost of infringement cheaper than licencing Ms. Rer's works at fair market value. This would create a financial incentive to infringe, and

encourage litigation in order to reduce the price of art licences. It is imperative that this Court not create such precedence, as it would undermine the aim of the Canadian copyright regime.

[65] Bestmont’s infringement included complete reproduction, display, and commercial use, of every image in the Façade project. The minimum award of \$25,000 would not be grossly in disproportion to this infringement for being too high, it would only be grossly in disproportion for being too low. The statutory damages award should therefore not be reduced pursuant to s. 38.1(3).

Microsoft Corp v 9038-3746 Quebec Inc, 2006 FC 1509 at para 110 [*Quebec Inc*].

D. Bestmont acted in bad faith and deterrence is needed against similar conduct

[66] Bestmont, a well-resourced luxury hotel, took advantage of a comparatively vulnerable, independent artist, when Ms. Rer, in good faith, provided high-quality, digital copies of her photos. Subsection 38.1(5) provides that the good or bad faith of the defendant, the conduct of the parties, and the need to deter other such copyright infringements, are all factors to be considered in assessing damages pursuant to s. 38.1(1)(a). Bestmont acted in bad faith by not making reasonable efforts to ascertain if it had any right to use the photos, reproducing them without consent, ignoring the requests to remove them from display, and choosing not to attribute Ms. Rer’s creations to her.

Copyright Act, supra para 17, s 38.1(5).

Century 21, supra para 23 at para 408.

[67] A sophisticated and well-resourced party has a higher burden of reasonableness. Bestmont had the resources to obtain independent legal advice on the issue of the copyright ownership when it was first presented with Ms. Rer’s images, rather than recklessly assuming copyright in them. Regardless of its reasons for not seeking such advice, deterrence is needed where a defendant did not conduct “sufficient due diligence to ascertain the copyright owner” prior to use of the works.

Apotex Inc v Merck & Co, 2002 FCT 626 at para 48 [*Apotex*].

CHUM, supra para 59 at para 44.

Airbus, supra para 57 at para 409.

Trader Corp, supra para 23 at para 67.

[68] Bestmont had several opportunities to verify its position on the copyright. Ms. Rer's initial offer, her repeated requests for the digital files to be returned, and her demand to have the photos removed from the displays, each signalled to Bestmont that seeking legal advice would be prudent.

[69] At a minimum, Bestmont should have removed the photos from the displays upon receiving Ms. Rer's demand, until the matter was resolved. Bestmont chose not to, until right before trial. Indeed, ignoring a cease-and-desist letter, in and of itself, constitutes poor conduct.

Century 21, supra para 23 at para 416.
Microsoft Corp v PC Village Co, 2009 FC 401 at paras 34-35 [*PC Village*].

[70] Further, Bestmont purposely omitted Ms. Rer's name from the photo displays, despite knowing her to be the artist and creator. This was a blatant, bad faith violation of Ms. Rer's moral rights to attribution, pursuant to s. 28.1 of the *Act*. This omission is especially egregious given that, as a digital influencer, Ms. Rer's livelihood depends on viewership, followers, and exposure.

Copyright Act, supra para 17, ss 14.1(1), 28.1.

[71] Moreover, digital works are easily stolen and misappropriated, and therefore they are in special need of protection. Providing the high-resolution images to Bestmont was a trusting gesture—one that Bestmont took advantage of in reproducing the images for its own benefit. Bestmont's abuse of this gesture was reprehensible, opportunistic, and in bad faith.

Collett v Northland Art Company Canada Inc, 2018 FC 269 at para 63 [*Collett*].

[72] Many young, burgeoning artists like Ms. Rer do not have the financial security to enforce their copyright ownership against infringement by corporate giants like Bestmont. To protect vulnerable digital creators from abuse by powerful infringers, and to dismantle any conception of legal impunity by such infringers, deterrence must factor heavily into the damages awarded here.

E. Punitive damages can be anticipated in statutory damages cases

[73] The *Act*'s statutory damages provisions allow a defendant to anticipate a punitive damages award. Thus, even when not pleaded, a defendant would not be unaware of the case to be met to

combat such an award. Yet, it was only *for* the purpose of knowing the case to be met, as a matter of fairness, that the SCC stated in *Whiten* that punitive damages must be pleaded to be awarded.

Whiten v Pilot Insurance Co, 2002 SCC 18 at paras 86-87 [*Whiten*].

[74] In *Whiten*, the primary focus was on ensuring that the *material facts*, justifying a punitive damages award, were pleaded. But in statutory damages cases, these material facts—for instance, reprehensible or high-handed conduct—go directly to the s. 38.1(5) criteria of bad faith, poor conduct, and the need for deterrence. *Whiten*'s primary concern, then, is not present here.

Whiten, supra para 73 at para 85, 87.

Whiten, supra para 73 at para 87.

[75] Further, a plaintiff's ability to elect statutory damages at any time, preventing a defendant from knowing the case to be met *until* that time, might also be construed as "unfair" by *Whiten*'s logic. But it is *not* unfair, because the potential for that election is explicit within the *Act*. Likewise, the possibility of punitive damages in statutory damages cases is also explicitly given in the *Act*.

Ritchie v Sawmill Creek Golf & Country Club Ltd, 2003 CarswellOnt 3058 at paras 36-37, [2003] OJ No 3144 [*Ritchie*].

Copyright Act, supra note 17, ss 38.1(1), 38.1(7).

[76] There is, therefore, no basis in a statutory damages case, where s. 38.1(5) is in issue, to argue a defendant would not be alerted to the possibility for punitive damages, even if not pleaded. Thus, the unfairness that *Whiten* targeted is not present in such cases. As *Whiten* added that whether a defendant has been taken by surprise by "a weak or defective pleading" will have to be assessed case-by-case, Lodge J did not violate the doctrine of *stare decisis* by awarding punitive damages.

Whiten, supra para 73 at para 88.

[77] Clearly, though, punitive damages will not be warranted in every statutory damages case in which aggravating factors under s. 38.1(5) are present. Punitive damages should continue to be employed with discretion, only in cases where a judge finds the defendant's conduct egregious. As Lodge J did find Bestmont's conduct egregious, punitive damages were an appropriate remedy.

F. Lodge J's award of statutory and punitive damages was appropriate

i) Deference should be given to Lodge J's decision on punitive damages

[78] Lodge J had the benefit of assessing the evidence of Bestmont's conduct, so his decision on punitive damages should be given deference, barring evidence that it was outside the range of reasonable outcomes. As \$500,000 or more in punitive damages *has* previously been awarded in statutory damages cases for copyright infringements, the award evidently did fall within that range.

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at paras 125-126 [*Vavilov*].
Nintendo of America Inc v King, 2017 FC 246 at para 174 [*Nintendo*].
Evocation Publishing Corp v Hamilton, 2002 BCSC 1797 at para 10 [*Evocation*].
Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc, 2011 FC 776 at para 180 [*Louis Vuitton*].
Twentieth Century Fox Film Corp v Hernandez, 2013 CarswellNat 6160 at para 1, 242 ACWS (3d) 400 [*Hernandez*].

ii) The statutory maximum per work is reasonable in the circumstances

[79] In awarding statutory damages one must "arrive at a reasonable assessment in all of the circumstances in order to yield a just result." Although this does not require a precise accounting of a plaintiff's losses, or a defendant's gains, such factors are relevant to assessing the award. As such, the \$3,000 licence fee that Ms. Rer designated per photo is only one part of assessing the appropriate quantum of damages. Other considerations must also be factored in.

Telewizja Polsat SA v Radiopol Inc, 2006 FC 584 at para 37 [*Telewizja*].
Patterned Concrete, *supra* para 24 at para 70.
Telewizja, *supra* para 77 at paras 41-45.
Trader Corp, *supra* para 23 at para 67.

[80] First, Ms. Rer would have benefited from Bestmont's promotional use of her photos, due to the widespread, public exposure of her work, associated with her name and the luxury hotel. Because she likely would have gained many new followers, in addition to prestige for collaborating with a luxury brand, there would have been a financial benefit to her business.

[81] Consequently, Ms. Rer's \$3,000 price per photo would not need to cover all of her production expenses, like labour, accommodation, and travel. Yet, she bore these costs for a year

to create the Façade project. Use of the photos *without* attribution, and the benefits attribution would bring, then, would warrant a higher price. To arrive at a fair award, these losses must be factored in. Indeed, *Rallysport 2020* found that production costs for infringed works could be construed as profits to the defendant, because the defendant used the works without those costs.

Rallysport 2020, supra para 55 at para 24.

Rallysport 2020, supra para 55 at para 28.

[82] In view of the circumstances and the need for deterrence, an award of \$20,000 per infringed work is reasonable. In addition to punitive damages, this quantum justly accounts for Ms. Rer's designated price per image, the labour and production costs, the higher cost of licencing the images for use without attribution, the bad faith of Bestmont, and the serious need to deter sophisticated defendants who feel they may act with impunity in infringing works of vulnerable digital artists.

iii) Lodge J's quantum achieved just compensation and punishment

[83] On the basis of these arguments, the Trial decision on the quantum should be reinstated. The amount of \$1,000,000 in statutory damages plus \$500,000 in punitive damages was an appropriate award to compensate Ms. Rer for the fifty works that were infringed, and to provide sufficient and proportionate punishment for Bestmont's reprehensible and high-handed conduct.

PART V: ORDER REQUESTED

[84] The Appellant respectfully requests that this Honourable Court allow the appeal, set aside the Judgment of the Court of Appeal, and restore the decision of the Trial Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 14th day of January 2022.

Team No. 2A
Counsel for the Appellant

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PART VII: APPENDICES

Appendix A

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*).

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

every original literary, dramatic, musical and artistic work includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science (*toute oeuvre littéraire, dramatique, musicale ou artistique originale*).

infringing means

(a) in relation to a work in which copyright subsists, any copy, including any colourable imitation, made or dealt with in contravention of this Act,

(b) in relation to a performer's performance in respect of which copyright subsists, any fixation or copy of a fixation of it made or dealt with in contravention of this Act,

(c) in relation to a sound recording in respect of which copyright subsists, any copy of it made or dealt with in contravention of this Act, or

(d) in relation to a communication signal in respect of which copyright subsists, any fixation or copy of a fixation of it made or dealt with in contravention of this Act.

The definition includes a copy that is imported in the circumstances set out in paragraph 27(2)(e) and section 27.1 but does not otherwise include a copy made with the consent of the owner of the copyright in the country where the copy was made (*contrefaçon*).

Compilations

2.1 (1) A compilation containing two or more of the categories of literary, dramatic, musical or artistic works shall be deemed to be a compilation of the category making up the most substantial part of the compilation.

Idem

2.1 (2) The mere fact that a work is included in a compilation does not increase, decrease or otherwise affect the protection conferred by this Act in respect of the copyright in the work or the moral rights in respect of the work.

Copyright 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.

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:

(a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country.

Ownership of copyright

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

Moral rights

14.1 (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

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.

Secondary infringement

27 (2) It is an infringement of copyright for any person to

[...]

(c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,

(d) possess for the purpose of doing anything referred to in paragraphs (a) to (c),

a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

Moral Rights Infringement

28.1 Any act or omission that is contrary to any of the moral rights of the author of a work or of the performer of a performer's performance is, in the absence of the author's or performer's consent, an infringement of those rights.

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.

Presumptions respecting copyright and ownership

34.1 (1) In any civil proceedings taken under this Act in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it,

[...]

(b) the author, performer, maker or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.

Liability for infringement

35 (1) Where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.

Proof of profits

35 (2) In proving profits,

(a) the plaintiff shall be required to prove only receipts or revenues derived from the infringement; and

(b) the defendant shall be required to prove every element of cost that the defendant claims.

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.

If a defendant unaware of infringement

38.1 (2) If a copyright owner has made an election under subsection (1) and the defendant satisfies the court that the defendant was not aware and had no reasonable grounds to believe that the defendant had infringed copyright, the court may reduce the amount of the award under paragraph (1)(a) to less than \$500, but not less than \$200.

Special case

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.

Factors to consider

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.

Exemplary or punitive damages not affected

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

Owner of copyright

53 (2) A certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright.

Appendix B

Copyright Modernization Act, SC 2012, c 20.

Preamble

Whereas the Copyright Act is an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors of the knowledge economy;

Whereas advancements in and convergence of the information and communications technologies that link communities around the world present opportunities and challenges that are global in scope for the creation and use of copyright works or other subject-matter;

Whereas in the current digital era copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms;

Whereas those norms are reflected in the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty, adopted in Geneva in 1996;

Whereas those norms are not wholly reflected in the Copyright Act;

Whereas the exclusive rights in the Copyright Act provide rights holders with recognition, remuneration and the ability to assert their rights, and some limitations on those rights exist to further enhance users' access to copyright works or other subject-matter;

Whereas the Government of Canada is committed to enhancing the protection of copyright works or other subject-matter, including through the recognition of technological protection measures, in a manner that promotes culture and innovation, competition and investment in the Canadian economy;

And whereas Canada's ability to participate in a knowledge economy driven by innovation and network connectivity is fostered by encouraging the use of digital technologies for research and education.