SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

(ON APPEAL FROM COURT OF APPEAL INTELLECTUAL PROPERTY DIVISION)

BETWEEN:

Wanda Rer

Appellant

-AND-

Bestmont Hotels

Respondent

FACTUM FOR APPELLANT

Team number: 3

2021-2022

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PART 1 – OVERVIEW

[1] This is a case about the ability of artists to protect their livelihood and maintain control over their work. Copyright law in Canada has striven to strike a balance between "the public interest in the encouragement of works of the arts"[1] and ensuring that "creators [are] paid when their work is used"[2]. Finding in favour of the Appellant, Ms. Wanda Rer ("Rer"), would further both objectives, allowing the court to properly protect vulnerable artists in the age of the internet, social media, and the rise of the gig economy.

[2] This appeal seeks to overturn a decision that denied Rer just compensation for her work and instead protected the interests of a luxury hotel chain. Rer is an independent photographer and social media maven. Photographs from her *Façade* photography project, featuring all ten of Bestmont's iconic locations, were misappropriated by the Respondent, Bestmont Hotels ("Bestmont"). When Rer approached Bestmont in good faith and offered to licence her Original and Filtered Photos (as well as provide her invaluable social media expertise) to Bestmont for use in an advertising campaign, Bestmont stole and reproduced her work for their commercial gain.

[3] The Trial Judge saw through Bestmont's attempt to hide behind an alleged immunity under copyright law to escape liability for its infringement of Rer's copyrights. They ensured that the line between Rer and Bestmont's rights was clearly drawn. We all benefit from and wish to encourage artists. Yet many, including corporations like Bestmont, seem to feel entitled to use their work for free. The decision under appeal condones such conduct. This appeal should be granted.

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[1] See *Théberge v. Galerie d'Art du petit Champlin inc.*, 2002 SCC 34 at para 30 [*Théberge*].
[2] *House of Commons Debates*, 35-2, (20 March 1997) at 9283 (Hon Sheila Copps).

PART II – STATEMENTS OF FACTS

[4] Ms. Wanda Rer is an independent artist, photographer and social media influencer who specializes in creating content that appeals to millennials.[3] Bestmont is a century-old luxury hotel chain, recognizable for their "unique designs and famous red marquee".[4]

[5] Rer frequently travels and takes photographs wherever she goes. She spent a year travelling across Canada and stayed at Bestmont's 10 locations. She took a photo of the front of each hotel. These ten Original Photos were taken to best showcase the hotels' unique designs and the integration and placement of their red marquee.[5] To that end, she made the artistic decision to take the photographs 100 feet in front of each hotel and center the red marquee mid-frame. She also used her social media expertise to create 40 additional works (the Filtered Photos), selecting the filters that she felt would best attract attention from the public. The filters she applied were 'sepia', 'oil painting', 'pixilation' and 'pencil drawing'.[6] She titled these photographs the *Façade* project.[7]

[6] Rer later met with Bestmont representatives and offered to license her Filtered and/or Original Photos "for use in Bestmont's marketing materials".[8] She provided a package of the 50 high-resolution images and advised that if Bestmont wanted a "different marketing feel", she could leverage her expertise to create more filtered or altered images. Bestmont refused her offer, accused her of violating their copyright, and demanded she destroy all copies of the *Façade* photographs. Rer requested the return of package, but they refused.[9]

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[3] See *Bestmont v. Wanda Rer*, 21 TCCIP 1222 at para 1 [*TCCIP*].
[4] *Ibid* at para 2.
[5] *Ibid* at para 3.
[6] *Ibid* at para 4.
[7] *Ibid* at para 3.
[8] *Ibid* at para 6.
[9] *Ibid* at para 7.

[7] Rer learned that Bestmont had in fact printed, disseminated, and displayed 120 photos across their 10 hotels' guest floors without her authorization. Each Original photo had been altered using a different filtering and editing software than Rer had used. They had applied 11 different filters to each, including 'sepia', 'oil painting', 'pixilation' and 'pencil drawing'. Rer was not credited at all.[10] Rer requested that the photos be removed, but Bestmont never responded. Rer then commenced proceedings, claiming infringement of her copyright. She requested the highest statutory damages under section 38.1 of the *Copyright Act* and a permanent injunction. Bestmont removed the photographs before trial, making the injunction unnecessary.[11]

[8] The Trial Judge found that Rer held copyright in each of her 50 photographs (Original and Filtered alike), and that each met the threshold of originality.[12] The judge concluded that Bestmont's architectural copyrights did not give them the ability to reproduce Rer's work, and that Bestmont had acted in bad faith and used the photos for a commercial purpose.[13] Bestmont was ordered to pay the maximum statutory damages of $20,000 per work violated, as well as $50,000 in punitive damages.[14]

[9] Bestmont appealed this decision to the Intellectual Property Division of the Court of Appeal, which granted the appeal. The court found that Bestmont had a right to reproduce the photos, that the *Façade* photographs did not meet the originality threshold, and that Rer was not entitled to any damages.

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[10] *Ibid* at para 8.
[11] *Ibid* at para 10.
[12] *Ibid* at para 16.
[13] *Ibid* at para 18.
[14] *Ibid* at para 25.

PART III – POINTS IN ISSUE

[10] This appeal raises three issues:

1. **Did the appeal judge err in finding that Bestmont had the right to reproduce Rer's work?**

   Yes. Section 32.2(1)(b) of the *Copyright Act* clearly states that it is not an infringement to photograph copywritten architectural works. Finding that Rer held copyright in her photos is consistent with Canadian legislative intent and other like-minded countries' policies. Rer was the sole person with the right to reproduce the *Façade* photos.

2. **Did the Appeal Court err in finding that if Bestmont had infringed Rer's work, they had only done so for the ten 'original' photographs?**

   Yes. Each of the 50 photos, both 'original' and 'filtered', were born from Rer's creativity and social media expertise, and are protected individually. Given the many creative decisions Rer took in taking the 'original' photos, they easily meet the low threshold for originality set out in *CCH Canadian Ltd.* The process of choosing the filters for the filtered photographs was also by no means simply mechanical.

3. **Did the Appeal Court err in finding that Rer was not entitled to statutory or punitive damages?**

   Yes. Bestmont infringed Rer's copyright for a commercial purpose, and Rer was therefore entitled to total statutory damages in the $1,500 to $1,000,000 range. Given the defendant's bad faith, the inequality between the parties, and several other factors, damages on the high end of the spectrum were reasonable. Additionally, the *Copyright Act* allows awards of both punitive damages *and* statutory damages. The trial court was free to penalize the defendant's high-handed conduct with punitive damages unprompted.

PART IV – ARGUMENTS IN BRIEF

1. Bestmont is liable for infringement of Rer's copyrights in the *Façade* photographs

1.1 Bestmont is not immune from a finding of infringement of Rer's copyrights

[11] Bestmont's exclusive copyright interests in the architectural design of its hotels and marquees have limits. As per subsection 32.2(1)(b)(i) of the *Copyright Act*,[15] it was not an infringement of Bestmont's copyright for Rer to reproduce in photographs each of Bestmont's ten architectural works. Indeed, since all Rer's works are original or filtered photographs, rather than architectural drawings or plans, the exception under subsection 32.2(1)(b)(i) applies.[16]

[12] Without prejudice to Bestmont's copyright interests, copyright may independently vest in original photographs of Bestmont's hotels and marquees. The Court of Appeal correctly noted that "[s]ubsection 32.2(1)(b) does not confer any right to assert copyright against others."[17] However, this does not mean that photographs are devoid of copyright protection. As noted by the Quebec Court of Appeal in *RTI Turbo inc. v. Canada allied Diesel Company LTD*, copyright in a photograph is not "[…] conditional on ownership of the subject matter photographed, nor does it require the copyright claimant to have any right in or to the subject matter photographed".[18] Two sets of rights can legitimately coexist, both of which are protected under subsection 3(1) of the *Copyright Act*: Bestmont's exclusive right to reproduce its architectural designs "or any substantial part thereof in any material form whatever"[19] and Rer's exclusive right to reproduce her photographs "or any substantial part thereof in any material form

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[15] *Copyright Act,* RSC 1985, c C-42, s 32.2(1)(b).
[16] *Ibid.*
[17] *Wanda Rer v. Bestmont,* 21 CAIP 333 at para 3
[18] *RTI Turbo v. Canada Allied Diesel Company Ltd*., 2007 QCCA 1420 at para 1 [*RTI*].
[19] *Copyright Act* Supra note 15 s 3(1).

whatever"[20]. While the *Copyright Act* excuses Rer's otherwise infringing acts, it does *not* excuse Bestmont's conduct in this proceeding.

[13] The legislator has chosen to limit rights in architectural works partly because of their functional purpose, but also because other artistic works serve a completely different market.[21] Applying the exception to copyright infringement under section 32.2 helps avoid "excessive control by holders of copyrights", which "may unduly limit the ability of the public domain to incorporate and embellish creative innovation […], or create practical obstacles to proper utilization."[22]

[14] This understanding is consistent with the approach taken by other countries that also recognize that photographs of buildings with copyrighted element can be protected by copyright. Many countries that are signatory to the Berne Convention (1866) provide for an exception to copyright infringement for pictorial representations of architectural works.[23] As acknowledged by the Supreme Court of Canada in *Théberge,* it can be insightful to "harmonize our interpretation of copyright protection with other like-minded jurisdictions".[24] In the United States, section 120 of Title 17 of the *United States Code* provides that "the copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of […] photographs […] if the building in which the work is embodied is […] ordinarily visible from a public place".[25] U.S. courts have applied this exception, for example to allow a film production company to display visually distinguishable towers in the background of movie scenes,[26] and have

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[20] *Ibid.*
[21] Daniel Johanne, « L'utilisation non autorisée de l'image d'un immeuble dans un contexte commercial : est-ce permis ou interdit? » in Y.Blais, eds, *Développement récents en droit du divertissement* (Cowansville : Barreau du Québec – Service de la formation continue, 2006) 3 at p 13.
[22] Théberge supra note 1 at para 32.
[23] Mary Lafrance, "Article: Public Art, Public Space, and the Panorama Right" (2020) 55:3 Wake Forest L. Rev. at p 630 at p. 599.
[24] *Théberge* supra note 1 at para 6.
[25] 17 USCS §120(a), 1990.
[26] See *Leicester v. Warner Bros,* 232 F.3d 1212.

expressly stated that "while an architect may not prevent a photographer from producing pictures of her buildings, that photographer may in turn certainly copyright these pictures".[27]

[15] In deciding the case as he did, the Trial Judge did not apply the doctrine of derivative works, despite referring to Rer's images as "derivative works". The derivative works doctrine "grants the owner of an original work the exclusive right to make work based on the original, and thus the right to prevent others from making derivative works".[28] The Trial Judge's conclusion may align with this foreign doctrine, but that does not mean that it was wrong under Canadian law.

1.2Bestmont has infringed copyright in each of Rer's 50 original works

[16] It is undisputed that, without Rer's consent, Bestmont:

- Used Rer's ten Original Photos to decorate the interior of its hotels
- Reproduced imitations of each of Rer's forty Filtered Photos using a different photo editing software
- Used Rer's ten Original Photos to generate more filtered images, and
- Displayed all 120 photos based on Rer's work in the hallways of its guest floors, without crediting Rer.[29]

[17] Since each of Rer's *Façade* photographs is an original work, as required by s. 5(1) of the *Copyright Act*, Bestmont's acts amount to copyright infringement. The Trial Judge's finding on this point was correct and ought to be restored.

[18] In *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Supreme Court of Canada set the standard for originality:

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[27] See *Tiffany Design inc. v. Reno-Tahoe specialty, inc.*, 55 F. Supp. 2d 1113. *(Tiffany)*
[28] Omri Rachum-Twaig, *Copyright Law and Derivative Works – Regulating creativity*, (London; New-York: Routledge, 2019) at p 2.
[29] *TCCIP* supra note 3 at para 8.

"an "original" work under the *Copyright Act* is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work **must be the product of an author's exercise of skill and judgment**. The exercise of skill and judgment required to produce the work **must not be so trivial** that **it could be characterized as a purely mechanical exercise**. While creative works will by definition be "original" and covered by copyright, creativity is not required to make a work "original" [emphasis added]."[30]

[19] Rer's creative process epitomizes "originality". Through her artistic eye, she developed and executed a particular approach to the photographs so that the images could individually convey her perceived atmosphere of the hotels, but still create an aesthetic ensemble if put together. At the editing stage, Rer carefully selected four filters based on her "judgement and experience as a photographer"[31]. She thus ensured that the images would have an "enhanced effect […] on the depiction of the hotel design",[32] and make for appropriate and attractive marketing materials.

The Original Photos

[20] Rer's Original Photos are indeed… original. Rer's creative process is similar to the one underwent in *Atelier Tango Argentin inc. c. Festival d'Espagne et d'Amérique latine inc.,* a decision which clarifies the original elements particular to photographs.[33] In *Tango*, the Quebec Superior Court explained that "the original character [in a photograph is] recognized by the choice, the arrangement and the pose of the subject, the choice of the shooting angle and the

[30] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at para 25 [2004] 1 SCR 339 [CCH].
[31] *TCCIP* supra note 3 at para 5.
[32] *Ibid*.
[33] *Atelier Tango Argentin inc. v. Festival d'Espagne et d'Amérique latine Inc.,* 1997 CanLII 8852.

lighting, and finally by the artistic work and the personal effort of the photographer"[34]. Like Rer, the photographer in *Tango* spent several days on the project, "finding the site, [completing] the conceptual work, and [realizing] the photoshoot in itself".[35] In *Tango*, it was recognized that the originality of the photo resided in the "[…] original usage of the material available"[36] (i.e., the street and the surroundings). Rer similarly made original use of Bestmont's unique architectural features to create her desired 'feel'.

[21] Several other factors support a finding of originality. Courts have accepted that the identification of a theme, the selection process in choosing the picture, and a "creative personal effort calling for imagination, ingenuity, experience requiring a knowledge of the targeted market"[37] are all relevant. The low threshold for originality can also be met through "the choice of the subject matter, the creation of the scene, [selecting] the angle of the photograph or other factors".[38] Rer's process is therefore far from a purely mechanic exercise, unlike, for example, changing the font of a work.[39] The "bulk of originality displayed"[40], to borrow the Court of Appeal's words, is a result of Rer's professional skills and judgement in choosing the theme, the angles, the appropriate camera settings etc., rather than a result of "Bestmont's artistic effort".[41]

The Filtered Photos

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[34] *Ibid* at para 39 [translated by author].
[35] *Ibid* at para 40.
[36] *Ibid* at para 44.
[37] *Salon Marcel Pelchat inc. v. Breton*, 2004 CanLII 12792 at para 25 [translated by author].
[38] *Century 21 Canada Ltd Partnership v. Rogers Communications inc.*, 2011 BSCS 1196 (CanLII) at para 187, citing John S. McKeown, *Fox Canadian law of Copyright and Industrial Designs*, 3rd ed (Toronto: Carswell, 2000).
[39] Supra note 30, at para 16.
[40] *CAIP supra* note 17 [*TCCIP*].
[41] *Ibid*.

[22] The ‘Filtered Photos are also original. Put differently, applying a filter to the Original Photos was not a simple mechanical exercise. The word “mechanical” is defined as: “working or operating like a machine; acting or performed without thought; lacking spontaneity or originality; automatic, routine” [42]. This was not the case here. Rer’s choice of filters was based on her knowledge of social media trends and her desire to “enhance [the] effect”[43] of the depicted hotel design. Moreover, an “exercise of skills” can be construed as “a particular aptitude in an exercise valued by the social group”[44]. Choosing the proper filter to convey an emotion or ‘feel’ in a photograph is of critical importance in social media practices and is valued by potential viewers.

[23] Rer’s use of filters that are found on a popular social media platform does not negate the originality of the Filtered Photos. As explained in *Temple Island Collections ltd v. New English Teas Ltd and another*[45], a British case, the use of “common place techniques” is not an issue. The importance lies in how the artist *used* the techniques “under the guidance of their own aesthetic sense to create the visual effect in question”.[46] Looking at the British case law, within the limits that Canadian law can allow, can be instructive.[47] In *Temple Island*, the claimant took a photograph in a very touristic area, depicting famous monuments of the London skyline and a red bus.[48] In editing his work, the claimant chose to adopt the style of the *Scheindlers’s list* movie (i.e. a single red element with a black and white background),[49] using a “standard piece of

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[42] J A Simpson *et al.*, *The Oxford English Dictionnary,* (New-York: Oxford University Press, 1989) sub verso “mechanical”.
[43] *TCCIP, Supra* note 3 at para 5.
[44] Gahel v. Corp Xprima.com, 2008 QCCA 1264 at para 45 [translated by author].
[45] *Temple Island Collections ld v. New English Teas Ltd and another*, [2012] EWPCC 1 [*Temple Island*].
[46] *Ibid*.
[47] *Desmarais v. Edimag*. 2003 CanLII 17515 (QC CA) at para 21-22.
[48] *Temple Island*, supra note 45, at para 4.
[49] *Ibid* at para 6.

software called Photoshop".[50] (see Image 1 in Annex 1). The defendant used a mix of their own photograph for the background and an iStockphoto for the bus to recreate the claimant's picture, using the same contrasting style (see Image 2 in Annex 1). The defendant unsuccessfully tried to negate the originality of the claimant's image on the basis that "[…] the place where he stood was where many tourists stand and photoshop is a bog standard bit of software which anyone can use".[51] The judge warned against such argument, as it confuses "what the artist actually did to create the work and what the result of that effort was".[52]

1.2 In the alternative, Bestmont is liable for infringement of 10 original works

[24] Should you find that the Filtered Photos are not original, Bestmont must at least be found liable for infringing Rer's copyright interests in all ten Original photos. The Court of Appeal suggested that "[I]f there is any copyright in the *Façade* photographs, it vests in the collection as a whole not the individual photos." This is wrong. Copyright *can* vest both in Rer's collection as a whole (the *Façade* project being a compilation of 50 original works) *and* the individual photos. As provided under subsection 2.1(2) of the *Copyright Act*, "[t]he 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."[53]

[25] Bestmont did not infringe Rer's compilation, it rather infringed each of Rer's *Façade* photographs and created 10 compilations of 12 images out of them, which it displayed in its hotels. Having admitted that "it reproduced the ten Original Photos" and given the fact that it holds ten registered copyrights (one for each of its hotels), Bestmont cannot reduce Rer's lawful

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[50] *Ibid* at para 5.
[51] *Ibid* at para 32.
[52] *Ibid* at para 33.
[53] *Copyright Act* supra note 15 s.2.1(2)

reproduction of each of its individually copyrighted designs to "a single concept". In *Rains v. Mollea,* a case involving a series of oil paintings using crumpled paper as an artistic technique, the judge found that "every image was the product of Rains' skills and judgement",[54] and that although it was reunited under a common label, it was not a compilation as it lacked skills in the arrangement of the images.[55] Therefore, reuniting images under a theme will not necessarily result in a copyrightable compilation, and this will not affect the copyrightability of each image insofar as such images meet the criteria set out in *CCH*. Each of Rer's *Façade* photographs should be individually protected, regardless of whether the entire *Façade* project constitutes a compilation.

2. Wanda Rer is entitled to total damages in the range of $200,000 to $1,500,000

[26] Rer is entitled to damages in an amount ranging from $200,000 to $1,500,000. Contrary to the Court of Appeal's decision, Bestmont's use of the *Façade* photographs was for a commercial purpose (**3.1**). Moreover, it was open for the Trial Judge to award both statutory damages and punitive damages (**3.2**). In any event, Rer is entitled to statutory damages at the highest end of the range applicable where infringements are for commercial purposes (**3.3**). The award of statutory damages should amount to $1,000,000 in statutory damages. In the alternative, should you find that only ten works were infringed, said statutory damages should amount to $200,000.

2.1 Bestmont's use of the Façade photographs was for a commercial purpose

[27] Bestmont's infringement was for a commercial purpose, and merits higher damages as a result. The Court of Appeal erred in stating that "Bestmont's use of the *Façade* photographs was not of commercial nature".[56] This is not the test under subsection 38.1(1)(a). While the act of reproducing photographs and displaying them in hallways might not have been of a commercial

[54] *Rains v. Mollea*, 2013 ONSC 5016 at para 12. [*Rains*]
[55] *Ibid* at para 17.
[56] *CAIP* supra note 3 at para 7

nature, it was for a commercial *purpose*: “improving the atmosphere for [Bestmont’s] paying guests”.

[28] There is no doubt that Bestmont benefited from the infringement. Proof of ‘actual’ revenues derived from the infringement is not required in statutory damages cases or for a finding of commercial purpose.[57] Bestmont’s hotels are known for being “carefully designed and curated to provide guests with an authentic experience”. In the competitive hospitality industry, the look and atmosphere of guest floors in Bestmont’s hotels is part of the ‘package’ that clients pay for. If simply displaying a photo on a school’s Facebook page has been found to be for a commercial purpose,[58] then displaying brand-promoting images a place of business is as well. The discernable benefit to Bestmont’s business also relates to the savings it made from not having to commission a professional photographer to take pictures of its famous red marquee at ten different locations across Canada and create 12 versions of each.

[29] An award of damages in the range applicable where infringements are for commercial purposes is reasonable here. Despite finding that Rer was not entitled to any damages, the Court of Appeal opined that a reasonable award would have been $15,000. This is three times the maximum amount of statutory damages allowed if infringements are for non-commercial purposes. While subsection 38.1(1)(a) provides for statutory damages ranging from $500 to $20,000 “for each work”,[59] subsection 38.1(1)(b) only grants damages ranging from $100 to $5,000 “for all works”. The Court of Appeal’s comment implies that statutory damages under subsection 38.1(1)(b) are insufficient here.

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[57] John S McKeown, *Fox on Canadian Law of Copyright and Industrial Designs,* (Toronto: Thomson Carswell, 1967) (loose-leaf updated 2003), ch 24 at p 2.
[58] See *Mejia v. LaSalle College International Vancouver Inc*., 2014 BCSC 1559 (CanLII) at para 215.
[59] See *Young v Thakur,* 2019 FC 835 at para 41.

2.2 *Rer was entitled to both statutory and punitive damages*

[30] Contrary to the Court of Appeal's mistaken understanding, the Trial Judge did not "award statutory damages in excess of the statutory range".[60] Despite the occasional use of somewhat confusing language purporting to "increase the statutory damages"[61] beyond the range provided in subsection 38.1(1)(a), the first instance decision is clear in that the Trial Judge awarded statutory damages amounting to $1,000,000 (i.e., $20,000 for each of the 50 infringed works, as per subsection 38.1(1)(a)) as well as punitive damages amounting to $500,000.

[31] Punitive damages may be awarded even if a copyright owner has been granted the maximum amount in statutory damages. Subsection 38.1(7) of the *Copyright Act* states that electing statutory damages "does not affect any right that the copyright owner may have to exemplary or punitive damages".[62] The *Copyright Act* therefore already contemplates a situation where punitive damages are awarded in addition to damages under subsection 38.1(1)(a). This interpretation is consistent with decisions like *Microsoft Corporation v. 9038-3746 Quebec Inc.*, where despite awarding the maximum amount of $20,000 per infringement in statutory damages,[63] the court still saw fit to award 100,000$ in punitive damages.[64]

[32] It does not matter that Rer did not claim punitive or demonstrative damages; the court still had discretion to award them. Subsection 38.1(7) of the *Copyright Act* refers to the "right that the copyright owner may have to exemplary or punitive damages", rather than the right to *claim* exemplary or punitive damages. Put differently, section 38.1 does not involve an election to recover statutory damages instead of punitive damages. As per section 34(1), copyright owners

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[60] See *Bestmont v. Wanda Rer*, 21 CAIP 333 para 8, [*CAIP*]
[61] *TCCIP* supra note 3 at para 25
[62] *CAIP supra* note 11, s 38.1(7).
[63] *Microsoft Corporation v. 9038-3746 Quebec Inc.,* 2006 FC 1509 (CanLII) at para 112.
[64] *Collett v. Northland Art Company Canada Inc.,*2018 FC 269 (CanLII) at para 65,76.

remain "entitled to all remedies… that are or may be conferred by law for the infringement of a right".[65] This entitlement is not conditional on the copyright owner's *request* of these damages.

[33] Unless expressly restricted, the courts' wide discretion usually includes the ability to choose whether to act, as well as qualify any actions taken. This principle is reflected in federal procedural legislation. For example, section 47(1) of the *Federal Courts Rules* explicitly states that "unless otherwise provided by these Rules, if these Rules grant a discretionary power to the Court, a judge[…] has jurisdiction to exercise that power on his or her own initiative *or* [emphasis added] on motion."[66] Section 64 of the *Federal Courts Rules* further provides that "the Court may make a binding declaration of right in a proceeding whether or not any consequential relief is or can be claimed". While this case is not governed by the *Federal Courts Rules*, the guidance that existing legislation provides as to court discretion is relevant and should be taken into consideration.

[34] Punitive damages are meant to reflect the court's outrage, which they should be able to express unprompted. As explained by the Supreme Court of Canada in *Whiten v Pilot Insurance*, punitive damages are to be awarded in "exceptional cases" [67] where the court finds all other damages to be "inadequate to accomplish the objectives of retribution, deterrence and denunciation"[68]. They are centred on the court's assessment of the case and the objectives that they believe require an additional 'boost'. Courts should not be limited in doing something when their sense of decency is affronted just because no one asked them to do so.

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[65] Supra note 15, s 38.1 (1)(a) – s 38.1(b).
[66] *Federal court rules*, SOR/98-106, r 47 (2).
[67] *Whiten v. Pilot Insurance Co.,* 2018 SCC 18 (CanLII) at para 36, [2002] SCR 595 [Whitten].
[68] *Supra* note 27 at para 123.

[35] Here, Bestmont's conduct "depart[ed] to a marked degree from ordinary standards of decent behaviour"[69]. They deliberately exploited Rer's unpaid and uncredited labour for months. As sophisticated copyright holders, they knew or at least should have known that Rer had not violated their copyright and that their unauthorized use of the materials was wrong. Yet they persisted in ignoring Rer, compelling her to launch legal proceedings. This type of conduct justifies awarding punitive damages.[70]

[36] Bestmont's conduct is even more high-handed[71] given the power differential between Bestmont and Rer. With the rise of the gig economy and freelance work, independent artists have little security, and rely on individual agreements to generate income. While traditionally, companies would commission art works or advertisements from established companies, in the new economic context, it is not unreasonable for artists to create works and then reach out to businesses to sell them. The courts need to send a strong message to stop the exploitation of freelance artists.

2.3 *__In any event, Rer is entitled to high statutory damages__*

[37] Considering "all relevant factors",[72] Rer is entitled to statutory damages in the amount of $20,000 per work. In calculating statutory damages, the court considers several factors set out in subsection 38.1(5), on a case-by-case basis. It is "not a precise science".[73] If it were, then there would be no difference between statutory damages claimed under section 38, and actual damages

[69] *Ibid* at 123.
[70] *2703203 Manitoba Inc. v. Parks*, 2006 NSSC 6 (CanLII), 47 C.P.R. (4th) 276 at para. 38(rev'd in part 2007 NSCA 36 (CanLII), 57 C.P.R. (4th) 391(N.S.C.A.)).
[71] *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC) at para 196, [1995] 2 S.C.R.
[71] *The Act,* note 15, s 38.1(5).
[72] *The Act, supra* note 15 s 38.1(5).
[73] See *Century 21 Canada Limited Partnership v Rogers Communications Inc.*, 2011 BCSC 1196 (CanLII) at para 387 [*Century 21*], citing *Pinewood Recording Studios Ltd v City Tower Development Corp*, [1996] BCJ No 2322.

claimed under section 35. All things considered, Rer is entitled to significant compensation, including to deter further infringements, which modern technology has facilitated in this case.[74]

[38] Bestmont's conduct is a textbook example of bad faith. While ignoring her, they unlawfully reproduced, distributed[75] and exhibited her work at their ten high end, primely located hotels. They did not even credit her for the work,[76] violating her moral rights. Furthermore, it was not until Rer was forced to circumnavigate their stonewalling by beginning proceedings against them that they removed the infringing works from their hotels. This goes well beyond the "usual evasiveness of a defendant".[77]

[39] Bestmont has no excuse for this reprehensible behaviour. Their actions do not reflect a simple lack of diligence.[78] Bestmont is a sophisticated and established hotel chain that has been around for a decade. They are not "entering into a new area with a new business plan".[79] They claim honest belief that Rer had violated their copyright. There are only *three* articles in the *Copyright Act* that directly mention architectural copyrights; Bestmont conveniently ignores that one provision (section 32.2(1)) which exempts Rer's project from a finding of infringement. Bestmont's conduct was "contrary to community standards of honesty, reasonableness or fairness".[80]

[40] Bestmont is not entitled to reduced statutory damages under section 38.1(3) of the *Copyright Act*. Given the commercial use of the photographs and Bestmont's abysmal conduct, awarding *less*

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[74] *Supra* note 23 at para 63.
[75] *Ibid.* at para 61.
[76] *Ibid.* at para 61.
[77] See *Don Hammond Photography ltd v. the consignment studio inc.*, 2008 ABPC 9 (CanLII) at para 13.
[78] See *Ankenman Associates Architects Inc. v. 09811478 B.C. Ltd.,* [2017] B.C.J No 408 at para 81.
[79] see *Century 21 Canada Limited Partnership v Rogers Communications Inc.*, 2011 BCSC 1196 (CanLII) at para 405.
[80] *Supra* note 39, citing *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 1991 CanLII 2707 (NS SC) at para 191-198, aff'd on appeal (1992), 1992 NSCA 70 (CanLII), 112 N.S.R. (2d) 180 (N.S.C.A.).

than 500$ per work infringed would "result in a total award that […] is grossly out of proportion"[81]. The quantum of the defendant's damages also reflects the exposure that Bromont brought upon themselves it elected to infringe *50* works. As in *Entral Group,* if the defendants "did not want to enter into a licencing arrangement" for $3,000 a photo, "all the defendants had to do" was stop.[82]

[81] *Supra* note 15, s 38.1(3)(b).
[82] *Entral Group International Inc. v. MCUE Enterprises Corp. (Di Da Di Karaoke Company)*, 2010 FC 606 (CanLII) at para 32.

PART IV – ORDER REQUESTED

[41] The appeal should be allowed, and the decision of the Trial Court should be restored. The Appellant seeks:

1. A declaration that the Respondent has violated Mrs. Rer's copyright in all 50 *Façade* photographs. In the alternative, a declaration that Bestmont violated Rer's copyright in her ten Original Photos.

2. Statutory damages in the amount of $1,000,000. In the alternative, statutory damages in the amount of $200,000$

3. Punitive damages in the amount of $50,000.

Friday, January 14, 2022.

PART V – TABLE OF AUTHORITIES

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<u>United kingdom</u>
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<u>United States of America</u>
Leicester v. Warner Bros, 232 F (3d) 1212 (9th Cir 2020).
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APPENDIX A: The photographs in Temple Island Collections ltd v. New English Teas Ltd and another.

Image 1 - Temple Island Collections Limited

Image 2 - New English Teas Limited

[83]

[83] "Photographers, photography copyright and the Red Bus Case", (2013), online: azrights <https://azrights.com/media/news-and-media/blog/database/2013/11/photographers-photography-copyright-and-the-red-bus-case/>.