IN THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

BETWEEN**:**

WANDA RER

Appellant

— and —

BESTMONT HOTELS

Respondent

FACTUM OF THE RESPONDENT

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PART I - OVERVIEW

[1] In this case, the fundamental issue is whether the Appellant has any rights under *the Copyright Act* (the "*Act*") to exert control over the Respondent's freedom to display photographs of its own copyrighted hotel designs and marquee. The *Act* was not intended to protect works lacking an exercise of skill or judgment. The Appellant's distorted use of the *Act* is a poor attempt to profiteer by riding the coattails of the Respondent's substantial and successful efforts in developing unique and recognizable hotel designs and marquees.

[2] The Respondent, Bestmont Hotels ("Bestmont"), is a luxury hotel chain with registered copyright in the façades of its ten hotels comprising of the famous red marquee and unique architectural designs. After the Appellant presented Bestmont with photographs of its own façades, Bestmont decided to decorate its guest floors with edited and unedited versions of the pictures.

[3] The Appellant, Ms. Wanda Rer ("Ms. Rer"), is a "self-described artist, photographer and social media influencer" who travels and takes photographs of her trips. While staying at Bestmont hotels, Ms. Rer took pictures that focused exclusively on Bestmont's copyrighted façades and then acted like numerous other social media users by applying standard pre-existing filters to these photographs. Without justifying her valuation, Ms. Rer then sought $3,000 per photograph by offering, Bestmont, the underlying copyright owner, the rights to display photographs of its own hotels.

[4] Ms. Rer now seeks to prevent Bestmont from using photographs of its own original designs. She cannot do this for three reasons.

[5] First, copyright does not subsist in the initial photographs. Ms. Rer did not contribute any originality beyond the originality already found in Bestmont's copyrighted façades, which resulted from the Respondent's artistic efforts in designing it. Simply reproducing in image-form the hotel's copyrighted works does not constitute an exercise of

skill and judgment. Since copyright protects only original works, Ms. Rer's photographs did not vest her with copyright protection.

[6] Second, Ms. Rer does not have copyright in the filtered photographs. Applying pre-existing filters does not transform an otherwise unoriginal work into an original one. There was nothing original about the filters chosen and used by Ms. Rer: she mechanically applied four readily available pre-existing filters found on numerous social media applications and made no additional edits. This simple process fails to pass even the low threshold of skill and judgment necessary to obtain copyright protection.

[7] Finally, copyright does not subsist in the collection of photographs of the hotels (the "Collection"). The Collection is not original: Ms. Rer photographed all Bestmont hotels without making a selection, an arrangement or exercising any skill or judgment. The only unifying theme was commercially motivated and consisted of the Bestmont brand. In sum, Ms. Rer does not have copyright in any work at issue in this appeal. In the alternative, if Ms. Rer does have copyright, it would only be in the Collection, not the individual images.

[8] Even if Ms. Rer has copyright, the Court of Appeal correctly held that she should only be entitled to a generous award of up to $15,000. Three reasons support this.

[9] First, the argument that Bestmont's use of the photographs was commercial is tenuous at best. Ms. Rer bears the burden of establishing her entitlement to statutory damages at the range reserved for commercial uses. Yet, as the Court of Appeal held, Ms. Rer adduced no evidence demonstrating that Bestmont's use of the pictures generated any additional revenue or business advantage. Since the photographs were displayed within Bestmont's private property and only visible to customers already acquainted with the Bestmont brand, their use of the photographs could not constitute an advertisement. Courts should be careful not to conflate a commercial use with a mere use by a commercial entity. Here, Bestmont's use of the photographs was not to generate additional revenue or secure a business advantage;

it was only to change the existing décor with something different. Paragraph 38.1(1)(b) of the *Act* states that the maximum statutory damages that can be awarded for non-commercial infringing uses, with respect to all infringements involved in the proceedings for all works, is $5,000. Hence, the Court of Appeal's hypothetical reasonable award of $15,000 already far exceeds what Ms. Rer ought to be entitled to.

[10] Second, regardless of whether Bestmont's use of the Initial Photos was commercial or non-commercial, Ms. Rer should not be entitled to the maximum award of statutory damages. Bestmont acted in good faith by removing the photographs from its hotels despite it being fully in the right to have kept them in place. Ms. Rer adduced no evidence that Bestmont's conduct was reprehensible during the proceedings or that it neglected any legal order. These factors, combined with the fact that Ms. Rer suffered little to no injury due to Bestmont's actions, support a statutory award far less than the maximum awarded by the trial judge. If she is entitled to anything, it should only be up to $15,000, as the Court of Appeal alluded to.

[11] Third, the trial judge erred in granting punitive damages to Ms. Rer as she had never claimed for them. This effectively deprived Bestmont of an adequate opportunity to respond to the claim and resulted in procedural unfairness. Furthermore, the evidentiary record did not support an award of punitive damages. Bestmont cannot be punished and deemed to have acted in bad faith for attempting to enforce its copyright in its hotel designs and marquee. As the Court of Appeal held, Bestmont genuinely believed that it had the right to reproduce the photographs of its own hotels. Its decision to remove the photographs from its hotels illustrates an act of good faith and, at the very least, did not constitute bad faith.

[12] This Court should affirm the Court of Appeal's finding that copyright does not subsist in the photographs taken by Ms. Rer: thus, Bestmont could not have infringed.

PART II - STATEMENT OF FACTS

[13] Bestmont Hotels is a chain of luxury hotels in Canada, best known for their unique hotel designs and red marquees that adorn the entrances to each of their ten Canadian hotels. Having operated for more than a century and through the expenditure of substantial resources, the brand has been associated with a reputation for high-end and luxury hotels. Most Canadians are familiar with the red Bestmont marquee and can identify it instantly.

Wanda Rer v Bestmont Hotels, 2021 TCCIP 1222 at para 2 [*Trial*].

[14] Ms. Rer, a self-described photographer, photographed the unique designs of all ten Bestmont hotel marquees. She repeated the same procedure for each photograph by standing directly in front of each Bestmont establishment at 100 feet and placing the marquee in the center of the frame. The ten unedited pictures are referred to as the "Initial Photos." Ms. Rer then mechanically applied four common filters she had no part in designing, namely the filters "sepia," "oil painting," "pixilation," and "pencil drawing," from a popular social media platform to the Initial Photos. These forty filtered images are referred to as the "Filtered Photos."

Trial, supra para 13 at paras 1, 3-5.

[15] Bestmont displayed the photographs of its hotel design on the guest floors, for which the Appellant then sued for copyright infringement and elected for statutory damages under s. 38.1 of the *Copyright Act* (the "*Act*").

Trial, *supra* para 13 at paras 8-9.
Copyright Act, RSC 1985, c C-42, s 38.1 [*Copyright Act*].

[16] The trial judge held in favour of Ms. Rer, determining that each of the Initial Photos and Filtered Photos were original artistic works subject to copyright. The judge also found that Bestmont infringed the copyright in the Filtered Photos despite Bestmont having applied its own filters to the Initial Photos. The Court determined that Ms. Rer's photographs were derivative works explicitly permitted by s. 32.2(1)(b) of the *Act*.

Trial, *supra* para 13 at paras 16, 18-19.

[17] The Court of Appeal overturned the trial decision, holding in favour of Bestmont. It found that since Bestmont was the owner of the underlying copyright in its hotel designs and marquee, they were immune from Ms. Rer's infringement allegations. It found the photos lacked originality since Ms. Rer had mechanically repeated the same method over and over at different hotels without exercising any judgment. Similarly, applying popular social media filters to existing photos does not meet the originality threshold. For damages, the Court found that the trial judge erred in finding that Bestmont's use of the images was commercial in nature. It found that public display alone is not determinative of commercial use. There was also no evidence that the use of the photographs had generated any additional revenue or business advantage. Finally, the Court held that the trial judge's award was grossly disproportionate to the infringement. The Trial Court erred in awarding statutory damages over the statutory range, awarding punitive damages that had not been pleaded, and determining that Bestmont had acted in bad faith. In sum, the Court of Appeal held that no infringement took place.

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

PART III - POINTS IN ISSUE

[18] This appeal raises three issues:

a. Does copyright subsist in the photographs of the façades or the Collection?

b. Did Bestmont infringe Ms. Rer's copyright by displaying the photographs inside their hotels?

c. If so, what damages is Ms. Rer entitled to?

PART IV - ARGUMENTS IN BRIEF

ISSUE 1: COPYRIGHT DOES NOT SUBSIST IN THE PHOTOGRAPHS AND THE COLLECTION THEREOF

[19] The Court of Appeal correctly held that copyright does not subsist in the Initial Photos. Copyright only protects original expressions, and Ms. Rer's images contained no originality except that provided by Bestmont's copyrighted façades. There is equally no originality and copyright in creating a collection of photos of all ten Bestmont hotels.

Appeal, *supra* para 17 at para 5.

I. The individual photographs are not copyrightable works

[20] Ms. Rer's Initial Photos are not subject to copyright as they are not original works under s. 5 of the *Act*. Her reliance on s. 32.2 of the *Act* is ill-founded. As held by the Court of Appeal, s. 32.2 only excuses a work that would otherwise constitute copyright infringement; it does not grant any exclusive rights in that work. Instead, Ms. Rer must satisfy s. 5 that provides that copyright shall subsist "in every original … artistic work." The Supreme Court established the guiding principles regarding originality in *CCH*. First, the work must be more than a mere copy of another work: there needs to be an exercise of skill and judgment that will necessarily involve intellectual effort. Skill is the use of one's knowledge, developed aptitude or practised ability in producing the work. Judgment is the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. 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. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work." Ms. Rer's approach to taking the photographs was trivial and mechanical

and did not meet the threshold originality required for copyright to subsist; her application of standard pre-existing filters did not transform the unoriginal works into original ones.

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

A. Each photograph was taken in a trivial and mechanical manner

[21] Ms. Rer's intellectual effort was trivial and mechanical and did not meet the originality requirement. She took pictures of all ten Canadian Bestmont locations. Irrespective of the hotel she was photographing, she mechanically chose to photograph the front façade of the hotel standing 100 feet from the entrance, focussing on the copyrighted marquee. Unlike in *Trader*, Ms. Rer did not consider the surrounding circumstances, the time of day, alternative angles, the lighting, or whether different photography equipment could better capture the hotel's essence. Her process was simply automated and required no skill or judgment.

Trial, *supra* para 13 at para 4.
Appeal, *supra* para 17 at para 5.
Trader Corporation v CarGurus Inc, 2017 ONSC 1841 at para 23 [*Trader*].

[22] *Rallysport* illustrates a case of photographs meeting the originality requirement of the *Act*. There, the photographers had to "acquire, situate, and photograph individual automotive parts and accessories – in some instances arranging them into "kits" – and to select the most appealing photos." For her part, Ms. Rer repeated the same motions with no consideration as to whether a different technique would have been more appropriate to capture the essence of each hotel. In *Geophysical Service*, the judge suggested that quick snapshots requiring no careful selection of the location, the angle of the shot, or refinement of the product would unlikely meet the required threshold of originality.

Rallysport Direct LLC v 2424508 Ontario Ltd., 2019 FC 1524 at para 48 [*Rallysport*].
Geophysical Service Incorporated v Encana Corporation, 2016 ABQC 230 at para 80 [*Geophysical*].

[23] The court in *Tango* stated that a mere photograph of the Montreal Olympic stadium, taken without any particular staging, would not meet the originality requirement of

the *Act*. It would be nonsensical to grant the author of such a work a 50-year exclusive right, as they could then prevent others from taking similar photographs.

> *Atelier Tango Argentin Inc v Festival d'Espagne et d'Amérique latine Inc*, [1997] RJQ 3030, 84 CPR (3d) 56 at paras 37-39 [*Tango*].

[24] Ms. Rer's photographs are not original. The originality of a photograph "can arise from the choice of subject matter, the creation of the scene, the angle of the photograph or other factors." Here, it is Bestmont, not Ms. Rer, that is responsible for creating the scene of the photographs. While Ms. Rer did choose Bestmont's façades as the subject matter, this was not an original choice. Here, "the parties agree that Bestmont's red marquee is well-known and instantly recognizable by most Canadians." This suggests that Bestmont's hotel designs and red marquee has often been the subject of photographs and publicity campaigns. Finally, Ms. Rer exercised no skill or judgment in deciding to photograph an establishment by standing directly in front of it. Arguably, people generally default to a right-angle picture when photographing an object or an establishment.

> *Century 21 Canada Limited Partnership v Rogers Communications Inc,* 2011 BCSC 1196 at para 187 citing John S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 3rd ed (Toronto: Carswell, 2000) [*Century 21*].
> *Trial*, *supra* para 13 at para 2.

[25] In addition, it took Ms. Rer little effort to do the project. While the trial judge states that this project took her a year, this is misleading. It is more likely that she decided to go on vacation to travel the nation for a year. The actual work put in the photo likely took but a few minutes per hotel.

B. <u>The application of filters does not transform otherwise unoriginal photographs into original ones deserving of copyright</u>

[26] Applying a pre-existing filter is insufficient to generate copyright in otherwise unoriginal photographs. Ms. Rer adduced no evidence concerning what the application of filters entailed. Even then, there was nothing original about the filters chosen. Ms. Rer simply

selected four standard filters from what is likely a limited selection on a popular social media platform. As repeated in many cases, "[i]f an idea can be expressed in only one or in a very limited number of ways, then copyright of that expression will be refused for it would give the originator of the idea a virtual monopoly on that idea." In these cases, the idea merges with the expression and is not copyrightable. The fact that other photo editing platforms use the same filter names indicates their ubiquitousness. This application of filters is analogous to the application of fonts such as "Times New Roman," "Arial," or "Calibri." The focus is on the popularity of fonts - these are the defaults. Notably, in *CCH*, the Supreme Court of Canada held that "any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trial to merit copyright protection as an "original" work." There is no conceivable way of seeing Ms. Rer's selection of filters as being an exercise of skill and judgment: she simply utilized the most common filters at the time. Using the filter cannot create any new copyright for the user since there is no effort, let alone skill, required to use it. It is a mechanical process used by social media influencers that requires no talent other than the mere ability to press a button. All of the originality and work are contained in creating the filter itself.

IP Moot Committee*, Fox Moot Clarification Questions*, (2021) at 1.
Delrina Corp. v Triolet Systems Inc, 23 BLR (3d) 231, [2002] OJ No 676 (QL) at para 48.
Appeal, *supra* para 17 at para 5.
CCH, *supra* para 20 at para 16.

II. The Collection is not a copyrightable work

[27] Section 2(a) of the *Act* defines a copyrightable "compilation" or collection as a work resulting from the selection or arrangement of…artistic works or of parts thereof. As stated in *CCH,* "[a] "Compilation" takes existing material and casts it in a different form." What is subject to copyright is "the over-all arrangement of [the components] which the plaintiff through his industry has produced." There was no originality in compiling photographs of each Bestmont hotel façade and keeping them stored electronically. Ms. Rer

did not personally select which hotels she would incorporate into her project: she simply decided on the Bestmont brand. Also, unlike in *Albo*, where the judge held that the plaintiff held copyright in a collection of photographs because he had arranged them on slides, Ms. Rer never demonstrated that she had arranged her photographs in a specific manner. She had also not fixed the size or contents of her claimed compilation as she was ready to "select and apply different filters to create different or additional filtered images" if Bestmont wanted a different marketing feel. Hence, there is no originality in the way she selected or arranged her subjects or the overall concept of taking photos of an entire chain of hotels.

> *Copyright Act*, *supra* para 15, s 2(a).
> *CCH*, *supra* para 20 at para 33.
> *Trial*, *supra* para 13 at para 6, 8.
> *Albo v The Winnipeg Free Press et al*, 2019 MBQB 34 at para 67 [*Albo*].

[28] In addition, compilations of copyrighted materials cannot entitle the compiler to any rights beyond selection and arrangement. When the compilation that contains the skill and judgment of the author is not included in the portion copied, only the underlying work is copied, and not the compilation. The *Act* offers protection to expression regardless of whether the expression is based on a preconceived notion. The addition of facts or changes in the underlying work, such as changing the font or correcting grammatical or spelling errors, are not enough to warrant copyright protection.

> Richard, H. G., *ROBIC Canadian Copyright Act Annotated, Carswell: Scarborough*, Ont, 1993 at s 5.3.1 [*Annotated*].

[29] In *Rains*, where an artist selected and arranged paper images with others, the court determined that there was no originality in the label itself. They saw that there was no skillful organizational aspect of the collection that warranted protection for the series as a whole. In *Pyrrha Design Inc,* artists selected nine seals out of 300. There was little evidence presented as to how they were chosen, and so the court found there was insufficient skill and judgment in the selections of the seals for the collection as a whole to receive copyright protection. Furthermore, the court found that the selection process was too closely aligned with trying

to copyright an idea, which is prohibited. At the case at bar, selection or arrangement for the Collection did not and could not involve skill or judgment: the order of the photos did not matter, and no evidence was presented to show that it did. Indeed, it is just a compilation of all ten Bestmont hotels: there can be no underlying theme, preconceived or not. This would be tantamount to copyrighting and granting a monopoly on the idea of taking photos of all establishments associated with a brand.

Rains v Molea, 2013 ONSC 5016 at para 17 [*Rains*].
Pyrrha Design Inc v Plum and Posey Inc, 2019 FC 129 at para 108 [*Pyrrha*].

III. An allegation for infringement in the reproduction of Bestmont's hotel design and marquee would lead to an absurd outcome

[30] The Court of Appeal correctly held that s. 3 of the *Act* provides that a copyright owner can produce or reproduce the work or any substantial part thereof in any material form whatsoever. Since Bestmont is the owner of the underlying copyright in the hotel and marquee, it cannot be found to infringe by reproducing that copyright in any medium, including through reproduction of the Initial Photos. There is no precedent asserting that a copyright owner can be precluded from using their own copyright to the extent that no additional copyrighted work has been created using it.

[31] As the Court of Appeal stated, policy concerns arise if the creator of a derivative work is permitted to control how a copyright owner chooses to reproduce its underlying work. In *Tango*, a studio was found to have infringed another artist's copyright by reproducing a substantially similar photo concept. It would be absurd if Bestmont were unable to take front-facing photographs of its own hotels focusing on its famous red marquee. Yet, if this court finds that Ms. Rer has copyright in the Initial Photos, s. 3 of the *Act* would effectively grant Ms. Rer the power to prevent Bestmont from photographing its own hotels head-on. Any attempt to do so could constitute a copyright infringement, and Ms. Rer could claim for a multitude of remedies, including an injunction. It is even more absurd because the

Act does not limit Bestmont's exclusive rights in such a way. The Supreme Moot Court should find that where there is little or no originality in a "derivative work," as is the case here, the author of the derivative work cannot assert its copyright against the underlying copyright owner.

> *Appeal*, *supra* para 17 at para 3.
> *Tango*, *supra* para 23 at paras 73-74.

[32] The *Act* is a balance between, on the one hand, promoting the public interest in the encouragement and dissemination of works of the arts and intellect and, on the other hand, ensuring that the creator of a work obtains a just reward and preventing others from appropriating the creator's just reward. In sum, there is no copyright in the photos, and there is no copyright in the Collection. Given that there is no copyright, there can be no infringement and no award for damages.

> *CCH*, *supra* para 20 at para 23, citing *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34 at para 30.

ISSUE 2: IN THE ALTERNATIVE, NO MORE THAN 10 WORKS WERE INFRINGED

I. Bestmont infringed a single work: the Collection

[33] If Bestmont did infringe Ms. Rer's copyright, this court should follow the Court of Appeal's reasoning that it would only be in regard to Ms. Rer's Collection.

> *Appeal*, *supra* para 17 at para 5.

II. In the alternative, Bestmont did not infringe Ms. Rer's copyright by applying its own filters

[34] If the judge finds copyright in the photographs, Bestmont would have only infringed a maximum of 10 works because the application of its own filters did not infringe. In applying the filters, Bestmont used some of those most popular at the time, which led to their use of filters different in all but name. Bestmont used filters from a different photo

editing software that applied different effects than those used by Ms. Rer. Inspiration alone is not sufficient to find copyright infringement. As stated in *Cinar*, borrowing from another work may also be a novel and original work simply inspired by the first: "everything is therefore a matter of nuance, degree, and context." Given that photo editing software often comprise a limited selection of pre-existing, ready-to-apply filters, it was likely inevitable that Bestmont would end up selecting popular filters bearing the same names as those used by Ms. Rer. Two filters bearing the same name but with substantially different results cannot be said to be the same filter – the names of the filters are irrelevant.

Appeal, *supra* para 17 at para 5.
Cinar Corporation v Robinson, 2013 SCC 73 at para 40 [*Cinar*].

ISSUE 3: IN ANY EVENT, MS. RER IS ENTITLED TO NO MORE THAN $15,000 IN DAMAGES

[35] If copyright subsists in Ms. Rer's Collection, the court should reduce the quantum of statutory damages and deny punitive damages. Under s. 38.1 of the *Act*, statutory damages are meant to compensate the copyright owner's losses.

I. Ms. Rer is not entitled to the maximum allowable statutory damages

[36] The range of statutory damages depends on whether the infringing use was commercial or non-commercial. In evaluating statutory damages, the court should consider the factors in s. 38.1(5) of the *Act*: a) the good faith or bad faith of the defendant; b) the conduct of the parties before and during the proceedings; and c) the need to deter other infringements of the copyright in question. The *Copyright Modernization Act* introduced an additional proportionality criterion in the case of infringements committed for non-commercial purposes.

Annotated, supra para 28.
Copyright Modernization Act, SC 2012, c 20, s 47 [*Copyright Modernization Act*].
Copyright Act, *supra* para 15 at s 38.1.

A. Bestmont's use of the Original Photographs and their filtered versions was not for a commercial purpose.

[37] Canadian jurisprudence is unclear as to what use constitutes a commercial purpose, and a formal definition favouring common-sense non-commercial purpose is in order. Black's Law Dictionary defines the notion of "non-commercial use" as being "a use for private pleasure or business purposes that does not involve the generation of income or bestowing a reward or other compensation." The display of photographs does not involve the generation of income and does not bestow a reward or other compensation on Bestmont. Bestmont did not sell nor display the photographs to the broad public. Instead, they placed the pictures within their private properties and, even then, only on their guest floors. Therefore, the photos were only visible to already-paying guests of the hotels. Furthermore, the Appellant adduced no evidence suggesting that the photographs had been edited in any way to induce existing guests of travelling to the other Bestmont locations. Nothing in the photographs indicated where the hotels were situated, what amenities they offered, or how one could even book a stay there. Apart from the unique hotel designs and marquees, nothing in the photograph even indicated that the hotels were Bestmont establishments. If a person recognized that the pictures depicted Bestmont locations, it was only due to Bestmont's tremendous efforts to build a famous hotel brand and develop instantly recognizable hotel designs and marquees.

B A Garner, eds, *Black's Law Dictionary*, (Thomson Reuters, 2019) sub verbo "noncommercial use".

[38] In any event, the Initial Photos simply reproduce the exterior of the hotel façades. There is no added commercial value in displaying photographs of what was already publicly visible. This is just a reproduction of what the clients already see from the outside – to the extent that there is a commercial purpose, it is with the hotel's exterior that brings people in, and there is no new added commercial value in reproducing its exterior.

[39] A difference exists between the commercial use of copyrighted works and the use of copyrighted works by a commercial entity. It should not be the case that any use of copyrighted material by a corporation constitutes a commercial use of copyrighted material.

[40] For non-commercial uses, the range is between $100 and $5,000, and for commercial uses, it is between $500 and $20,000. Additionally, where the use is commercial, s. 38.1(3)(b) of the *Act* grants the court the discretion to award a lower amount of $200 where even the minimum amount is, in the court's opinion, grossly out of proportion to the infringement. In *Century 21*, mitigating factors in considering the applicability of 38.1(3) and reducing the statutory damages awarded included the fact that the length of the infringement was relatively short and that it was unintentional. These are both factors at play in this case.

> *Century 21*, *supra* para 24 at paras 421, 426.
> *Copyright Act*, *supra* para 15 at s 38.1.

B. The Trial Judge's award of statutory damages, even in the range reserved for commercial uses, was grossly out of proportion to the infringement

[41] The statutory damages award sought by Ms. Rer is out of proportion to the infringement. In assessing statutory damages, a judge must make an award based on "a reasonable assessment [of] all of the circumstances in order to yield a just result." Here, if Bestmont did infringe Ms. Rer's copyright, it was minimal and not deserving of maximum statutory damages.

> *Telewizja Polsat S.A. v Radiopol Inc.*, 2006 FC 584 at para 37.

[42] If Bestmont infringed Ms. Rer's copyright, it was minimal at most. First, Bestmont did not use the copyrighted material for commercial purposes, as detailed above. The photographs were viewable only to paying guests, not the wider public. Second, Bestmont drew no attention to the photographs as they simply served as a background décor for the hallways. Hotel guests would likely pay little to no attention to the photographs and only view them incidentally as they navigate from their rooms to the elevators and vice-versa.

Third, Bestmont's use of the photographs in no way affected Ms. Rer's ability to profit from them. Ms. Rer was permitted to take the photographs according to s. 32.2(1)(a) and (b) of the *Act*. While s. 32.2(1) did not vest Ms. Rer copyright in the photographs, it permitted her to photograph the hotel establishments and publish the photos to her social media. Since Bestmont did not post the pictures online, they did not compete with Ms. Rer's typical target audience. For these reasons, if there was any infringement, it was minimal at most.

[43] This Court should uphold the Court of Appeal's judgment that Bestmont did not infringe by displaying the photographs and that, therefore, they are not liable for statutory damages. However, if the Court finds that Ms. Rer did have copyright, it should award statutory damages far below the maximum of $5,000 for each work infringed.

[44] The Court of Appeal was correct that a more reasonable award would have been $15,000 as Bestmont's conduct did not warrant the maximum award of statutory damages.

Appeal, *supra* para 17 at para 9.

C. Bestmont's conduct was in good faith

[45] Bestmont has consistently acted in good faith, and the Appellants have failed to prove otherwise. Bestmont had the right to reproduce and use photographs of its own copyrighted hotel designs and marquee. It would be unreasonable to expect entities to cease using copyrighted material they genuinely believed they had a right to use upon receiving a non-formal request. Bestmont chose to remove the photographs from its hotels, not because of an obligation to do so but out of good faith. Ms. Rer had only sent personal messages highlighting her disapproval of Bestmont's use; she had not obtained any legal advice to support her position. Once she commenced a formal action, it was out of an abundance of caution and good faith that Bestmont decided to remove the photographs. Even if the Court finds that Bestmont did not act in good faith, it should consider the judge's statement in

Century 21 that "a failure to act in good faith does not necessarily imply that a party has acted in bad faith."

Century 21, *supra* para 24 at para 408.

D. The award of statutory damages cannot be a deterrent for using images of one's own copyright

[46] Concerning the third factor, deterrence, the following comments in *Louis Vuitton Malletier* are relevant: "an aspect of deterrence… is the behaviour of the Defendants. The award … should attempt to deter conduct where orders of the Court and other legal remedies are blatantly ignored." Here, no legal orders were ignored: the Appellant had only asked the Respondent to stop. There was no formal legal cease and desist letter. Bestmont graciously removed the photographs from their hotels when the proceedings commenced. Further, no quantum of statutory damages will deter the owner of copyrighted material from utilizing images of its own copyrighted works.

Louis Vuitton Malletier S.A. v Yang, 2007 FC 1179 at para 25 [*Louis Vuitton Malletier*].

E. The award of statutory damages was not proportional with the infringement in question

[47] The additional proportionality criterion of the *Copyright Modernization Act* states that the award in case of a non-commercial infringement shall be in proportion with the infringements and consider the i) hardship on the defendant and ii) the impact of the infringement on the plaintiff.

Copyright Modernization Act, *supra* para 36.

[48] The impact of the infringement on Ms. Rer was minimal. Like in *Nicholas*, there is no evidence that Ms. Rer "suffered any damages or that the [Bestmont] made any profit as a result of the infringing act. This is simply a technical breach and does not warrant the [Appellant] receiving a substantial windfall. Statutory damages require an assessment of the reality of the case and a just result." There was no evidence of any market for the

photographs. In addition, the use of the photographs was not in direct competition with Ms. Rer's ability to sell or use the photographs elsewhere. Ms. Rer is a social media influencer who makes a living by posting photographs on her social media account and generating traffic. Bestmont did not impede Ms. Rer's ability to continue doing so in any way as they did not display the photographs on their own social media accounts nor publicize that these photographs could be found in their hotels. If they had never displayed the photographs, the effect on Ms. Rer would have been the same: nil.

Nicholas v Environmental Systems (International) Ltd., 2010 FC 741 at para 105 [*Nicholas*].

[49] In addition to the factors listed in the *Act*, the courts may consider the basis for damages: the damage done to the Appellant. Like in *Don Hammond*, this measure is theoretically the depreciation in the copyright value as an asset caused by the infringement. Although Ms. Rer might have intended to use these photos for her own advertising purposes, which seems unlikely and for which there was no evidence, Bestmont could not have devalued the copyright in any way. In the USA, when the plaintiff incurs few or no damages and the infringing act generates minimum profits to the defendant, the courts tend to diminish the amount of statutory damages awarded.

Don Hammond Photography Ltd v The Consignment Studio Inc., 2008 ABPC 9 at para 14 [*Don Hammond*].
Bly v Banburry Books, Inc, 683 F Supp 983 (ED Pa 1986) at 988.
Morser v Bengor Products Co. Inc., 283 F Supp 926 (SD NY 1968) at 929.

II. **Bestmont is not liable for punitive damages**

[50] In *Whiten,* the Court held that punitive damages are the exception, not the rule, and that they should be imposed only where there has been high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs significantly from ordinary standards of decency. The assessment should look at the harm caused, the extent of the misconduct, the claimant's relative vulnerability, and any advantage gained by the Respondent and should consider whether the other penalties are inadequate to achieve retribution, deterrence and

denunciation and only to the extent necessary to accomplish the objectives. Taking these principles into consideration, Bestmont should not have been imposed punitive damages in addition to the statutory damages.

Whiten v Pilot Insurance Co., 2002 SCC 18 (CanLII), [2002] 1 S.C.R. 595 (SCC) at para 94 [*Whiten*].

A. Bestmont acted in good faith, or at least, did not exemplify malicious conduct

[51] Bestmont simply put up photographs in its hotels, believing it was legally allowed to because it held the underlying copyright. Bestmont bore no ill will toward Ms. Rer. Its conduct did not represent a marked departure from ordinary standards of decent behaviour, nor was it malicious, oppressive, or high-handed, nor did it offend the court's sense of decency. Further, Ms. Rer did not adduce any evidence suggesting that an award of statutory damages would be inadequate to accomplish the objectives of retribution, deterrence, and denunciation. The trial judge's assumption that "Bestmont has deep pockets and can afford to pay" does not make up for the lack of evidence. Furthermore, as stated in *Collett*, in recent years, courts have awarded punitive damages against individual defendants for copyright infringement ranging from $10,000 to $100,000.

Collett v Northland Art Company Canada Inc., 2018 FC 269 at para 75 [*Collett*].

[52] Even with "outrageous," "highly unreasonable," and callous disregard for the rights of the plaintiffs, the Court in *Louis Vuitton Malletier SA* remained within the typical range and awarded punitive damages of only $100,000. In *Collett*, the judge found that the Defendant's infringement was planned and deliberate, had occurred numerous times, was motivated by profit, and had attempted to pass off the Plaintiff's work to another photographer. Despite these findings, the Court awarded punitive damages of only $25,000. Here, Bestmont is accused of only one infringement and, while they deliberately displayed the photographs, they did not deliberately display the photographs thinking they were

infringing any copyright. Once court proceedings were initiated, Bestmont, despite its right, took down the photographs out of courtesy to Ms. Rer.

> *Louis Vuitton Malletier*, *supra* para 46 at paras 52-59.
> *Collett*, *supra* para 51 at paras 73-76.

[53] Here, nothing suggests that Bestmont has repeatedly engaged in infringing copyrighted works. While they deliberately displayed the photographs, they did not do so thinking they were infringing any copyright. Once court proceedings were initiated, Bestmont, despite its right to reproduce its own copyrighted works, removed the photographs from display without any resistance. There were no deliberate attempts to mislead or attribute Ms. Rer's work to another. Bestmont's conduct during the proceedings has and continues to be cooperative and has not caused Ms. Rer additional expenses.

B. The Court of Appeal correctly held that punitive damages were unwarranted

The trial judge erred in not considering the adequacy of statutory damages to achieve deterrence. The court can only impose additional punitive damages if it deems the other penalties insufficient. Even if condemnation of statutory damages is not a bar to punitive damages, those punitive damages shall not duplicate statutory damages and remain an extraordinary remedy.

SUMMARY

[54] Ms. Rer does not have copyright in any work at issue in this appeal as no additional originality or exercise of skill and judgement was demonstrated. Even if Ms. Rer has copyright, she should only be entitled to an award of up to $15,000. Ms. Rer's attempt to inappropriately use the *Act*'s protection for her own profit and deprive a copyright holder the use of their own copyright must fail.

PART V - ORDER REQUESTED

[55] The Respondent respectfully requests that this appeal be dismissed.

PART VI - TABLE OF AUTHORITIES

AUTHORITY	Pinpoint
LEGISLATION	
Copyright Act, RSC 1985, c C-42	ss. 2, 3, 5, 32.2, 38.1
Copyright Modernization Act, SC 2012, c 20	s. 47
JURISPRUDENCE: CANADA	
Albo v The Winnipeg Free Press et al., 2019 MBQB 34.	67
Atelier Tango Argentin Inc v Festival d'Espagne et d'Amérique latine Inc, [1997] RJQ 3030, 84 CPR (3d) 56.	37-39, 73-74
CCH Canadian Ltd v Law Society of Upper Canada, 2004 SCC 13.	16, 30, 33
Century 21 Canada Limited Partnership v. Rogers Communications Inc., 2011 BCSC 1196.	187, 408, 421, 426
Cinar Corporation v. Robinson, 2013 SCC 73.	40
Collett v. Northland Art Company Canada Inc., 2018 FC 269.	73-76
Delrina Corp. v Triolet Systems Inc, 23 BLR (3d) 231, [2002] OJ No 676 (QL).	48
Don Hammond Photography Ltd. v. The Consignment Studio Inc., 2008 ABPC 9.	14
Geophysical Service Incorporated v Encana Corporation, 2016 ABQC 230.	80
Louis Vuitton Malletier S.A. v. Yang, 2007 FC 1179.	25, 52-59
Nicholas v Environmental Systems (International) Ltd., 2010 FC 741.	105
Pyrrha Design Inc v Plum and Posey Inc, 2019 FC 129.	108
Rains v Molea, 2013 ONSC 5016.	17
Rallysport Direct LLC v 2424508 Ontario Ltd., 2019 FC 1524.	48
Telewizja Polsat S.A. v. Radiopol Inc., 2006 FC 584.	37
Théberge v. Galerie d'Art du Petit Champlain inc., 2002 SCC 34.	30
Trader Corporation v CarGurus Inc, 2017 ONSC 1841.	23

Whiten v Pilot Insurance Co., 2002 SCC 18 (CanLII), [2002] 1 S.C.R. 595 (SCC).	94

JURISPRUDENCE: FOREIGN	
Bly v Banburry Books, Inc, 683 F Supp 983 (ED Pa 1986).	988
Morser v Bengor Products Co. Inc., 283 F Supp 926 (SD NY 1968).	928

SECONDARY MATERIALS	
B A Garner, eds, *Black's Law Dictionary*, (Thomson Reuters, 2019)	"noncommercial use"
H G Richard, *ROBIC Canadian Copyright Act Annotated,* (Carswell: Scarborough, Ont 1993)	s. 5.3.1