

IN THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY

BETWEEN:

WANDA RER

Appellant

– and –

BESTMONT HOTELS

Respondant

FACTUM OF THE APPELLANT

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PART I - OVERVIEW

1. The essence of Copyright Law is to “civilize”¹ the way a piece of work is exploited by its author and third parties. Indeed, the *Copyright Act* (Hereinafter “**the Act**”) aims at encouraging creativity and provide access to imaginative and original efforts to a wide audience, while protecting the rights of copyright’s owners in the way of statutory monopoly in the exploitation of their work. Thus, this delicate balance between economic, social and philosophical matters is truly at the heart of the law.
2. The present case is raising several issues from a copyright infringement standpoint. Both Judges from the Trial and Appeal Courts had to analyze whether Ms. Rer owned copyrights in her photographic work, and if so, whether Bestmont Hotel infringed that copyright according to the letter of the Act. Since the economic consequences call for fair compensation, the quantum of damages had to be assessed, taking into account the seriousness of the offense.
3. As explained in detail below, this Supreme Moot Court should set aside the Court of Appeal’s decision and recognise that Ms. Rer’s Façade Project is original and should be protected by the *Act*.

PART II - STATEMENT OF FACTS

4. The Appellant, Ms. Wanda Rer (hereinafter “**Ms. Rer**”), is a Canadian photographer, social media influencer and self-described artist. She created a photo project composed of a series of 10 original (“**Unaltered Work**”) and 40 enhanced (“**Filtered Work**”) photos, forming her “Façades” project (hereinafter the “**Façades Project**”). Using the exact same set up for each photo, she focused her series on the uniqueness of the Bestmont Hotels’ marquees and design facades.

¹ *Films Rachel Inc. v. Duker & Associés Inc* [1995], Doc C.S Montréal 500-11-001622-931 (Que. S.C), at para 22.

5. The Respondent, Bestmont Hotels (hereinafter “**Bestmont**”), is a luxury hotel chain based in Canada. It is widely known to possess hotels at some of the best locations, scattered across the country. High-end service and decor as well as curated facades and marquees are its hallmark within the hospitality industry and its clientele.
6. Ms. Rer approached Bestmont to license her photographs as marketing material and provided Bestmont with digital copies of her Façades Project. Bestmont rejected Ms. Rer’s offer and accused her of infringing its own copyright in its marquee and facade designs. It subsequently decided to reproduce and use Ms. Rer’s photographs to decorate the hallway of its guest floors. Bestmont used Ms. Rer’s Unaltered Work and also enhanced some of them by applying similar filters to the ones Ms. Rer used to create her Filtered Work.
7. Bestmont was not entitled to use Ms. Rer’s Façades Project without her permission, which is an infringement of her copyright. In fact, Bestmont does not have any rights in Ms. Rer’s Façades Project. Even if the Façades Project did focus on Bestmont’s marquees and facades, both the Unaltered Work and Filtered Work taken of the hotels’ facades were original as they were created with Ms. Rer’s skill and judgment. The choice of camera set-up, technique, point of view and angle, as well as the choice of filters were all done to achieve a specific result and are sufficient to consider the entire Façades Project as original works.
8. Furthermore, the reproduction of the photographs by Bestmont is substantial due to their use of similar filters to enhance some of their prints. The fact that they used filters with similar names to the ones used by Ms. Rer gives away their intention to mimic her work.
9. Finally, the display of them as framed art in its hotels for the benefit of its clientele, toads to the prestige and decoration of the venues. This curated and detailed atmosphere is a feature Bestmont is well-known for in the hotel industry and luxury world. With guests

paying for this type of luxury, Bestmont made a commercial use of Ms. Rer's Façades Project.

10. Upon learning of Bestmont's use of her work without prior licensing agreement, Ms. Rer asked for the removal of all the litigious pictures from the hotel's guest floors, to no avail. With no response from Bestmont, she filed a claim before the Intellectual Property Division of the Trial Court of Canada, stating copyrights infringement and asking for a permanent injunction and the highest statutory damages allowable pursuant to section 38.1 of the *Copyright Act*. Bestmont argued that Ms. Rer did not hold any copyright in her Façades Project, and that, even if she did, Bestmont would still keep the possibility to reproduce its own copyright in the red marquees and facades².

Trial Decision

11. The Honourable Justice Lodge ruled in favor of Ms. Rer on both matters of Copyright infringement and statutory damages. It was found that copyright subsisted in each photograph of both the Unaltered Work and Filtered Work due to their originality: using the same set-up for each location is not to be considered a mundane mechanical exercise, but one of artistic expression, which should be protected by the *Act*.
12. Consequently, Bestmont has infringed Ms. Rer's copyright by reproducing her Unaltered Work and by altering it with filters of their own. The fact that the pictures are depicting Bestmont's design and marquee, of which they hold copyright, does not allow them to produce copies or colourable imitations of Ms. Rer's Façades Project.
13. Justice Lodge awarded Ms. Rer \$1,500,000 as statutory damages which includes \$20,000, for each of the 50 photos infringed, as they were for commercial use, and to which punitive damages of \$500,000 were added, on Judge Lodge's own accord, as a deterrent

² *Wanda Rer v Bestmont Hotels*, 21 TCCIP 1222 [Trial Court Judgment], at paras 9, 10, 11; *Copyright Act*, *supra* note 1 at s 38.1.

effect against Bestmont blameworthy conduct and blatant bad faith towards a vulnerable independent artist³.

Appeal Decision

14. The Court of Appeal overturned the Trial decision and held in favour of Bestmont. The Court found that Bestmont was legally exempt from Ms. Rer's alleged copyright because Bestmont is the owner of the copyright on the marquee and facade designs. Bestmont can thus reproduce any work depicting these two features, in any medium or format it sees fit. Moreover, the Court of Appeal opined that the doctrine of derivative work used by the Trial Judge to furthermore justify the infringement of Ms. Rer's work is, at present, a foreign principal with a tenuous position within Canada's legislation and doctrine. The Court additionally addressed the legal test used by the Trial Judge to gauge the originality of Ms. Rer's work. The Court considered it too low.

15. In fact, the Court concluded that the individual photos constituting the Façades Project, when judged alone, cannot be considered as having artistic originality or expression. Ms. Rer's work is a mechanical repetition with a minimal amount of originality, Furthermore, the application of filters in post-production is not constitutive of an original artistic expression either.

16. As such, Ms. Rer's work cannot be protected by the *Act*, as it does not hold copyright itself, and so no copyright infringement was conducted by Bestmont.

17. With respect to the amount awarded for damages, the Court considered the amounts as grossly exceeding the seriousness of the alleged infringement.

18. First, with no evidence that Bestmont capitalized and generated revenues from the display of Ms. Rer's photos, the use of her work cannot be considered as commercial.

³ *Trial Court Judgment, supra* note 2 at paras 13 - 16, 18 - 26; *Copyright Act, supra* note 1 at ss 5(1), 32.2(1)(b), 38.1(1), 38.1(1)(a), 38.1(7).

19. Second, the award should have been reduced according to subsection 38.1(3) of the *Act* because of multiple works reproduced on the same medium.

20. Lastly, Ms. Rer was willing to license her entire Original collection for \$30,000, and awarding her fifty times that amount in damages would be truly unreasonable: this would place her in a far better position than she could have expected. Even if an infringement had been qualified, the damages awarded should not have exceeded the amount Ms. Rer was genuinely anticipating: \$30,000⁴.

PART III - POINTS IN ISSUE

21. The issues in this appeal are:

- a. Whether copyright subsists in Ms. Rer's Façades Project;
- b. If this is the case, to what extent has Bestmont infringed that copyright;
- c. In case of infringement, what is the appropriate quantum of statutory damages.

PART IV - CONCISE STATEMENT OF ARGUMENTS

ISSUE I: COPYRIGHT SUBSIST IN MS. RER'S PHOTOGRAPHS BECAUSE THEY ARE ORIGINAL WORKS

I. The question of Bestmont's underlying copyright has no impact on Ms. Rer's own right to the protection of her work

A - The Court of Appeal is misguided in its application of Section 3 of the Act to justify Bestmont immunity to the infringement

22. The Court of Appeal based its decision that Bestmont did not infringe Ms. Rer's copyright on the fact that Bestmont was the first holder of a registered copyright to its Facades and Marquees. The Court of Appeal is however misguided in its application of Section 3 of the *Act* to justify Bestmont immunity to the infringement.

⁴ *Bestmont Hotels v Wanda Rer*, 2021 CAIP 333 [Appeal] at paras 1-10.

23. Under the *Act*, copyright in a work does not depend on its actual registration but automatically subsists in “every original literary, dramatic, musical and artistic work” if certain conditions are met⁵. The author of this work is the first owner of the copyright⁶. Copyright therefore arises automatically from original work, which is correlative to the concept of authorship⁷.
24. The author refers to the person who puts the work into a concrete form⁸, or who “actually writes, draws or composes a work”⁹. In other words, it is the person who expressed the idea “in an original and novel form”¹⁰.
25. Consequently, if Ms. Rer’s Façades Project is found to be an original work, she will be considered as the first author of the work as per section 13(1) of the *Act* and will therefore benefit from a copyright protection for her Façades Project.

B - The application by the Trial Judge of subsection 32.2(1)(b) was correct

26. Subsection 32.2(1)(b) of the *Act* provides that it is not an infringement of copyright for a person to reproduce in photograph an architectural work¹¹. According to the Court of Appeal, reliance on subsection 32.2(1)(b) is misguided in this matter, because this subsection excuses what would be a copyright infringement and does not confer a right to assert copyrights against others.
27. However, subsection 32.2(1)(b) does not exclude one’s right to assert copyrights on photographs they took if same are considered original works^{12 13}.

⁵ *Copyright Act*, *supra* note 1 at s 5(1).

⁶ *Ibid.*, at s 13(1).

⁷ Barry Sookman, Steven Mason and Carys Craig, *Copyright: Cases and commentary on the Canadian and International Law*, 2nd ed. (Toronto: Thomson Reuters, 2013), at 437.

⁸ *Dubois v. Systèmes de Gestion et d’Analyse de Données Média/Média-Source Canada Inc.* [1991], 41 C.P.R. (3d) 92 (Que. S.C.).

⁹ John McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 2nd ed. (Toronto: Carswell, 1967), at 239.

¹⁰ *University of London Press Ltd. v University Tutorial Press Ltd* [1916], 2Ch. 601, at page 608.

¹¹ *Copyright Act*, *supra* note 1 at s 32.2(1)(b)(i).

¹² *Ibid.*, at s 5(1).

¹³ *Ibid.*, at s 2(3).

28. Both Courts agree that Ms. Rer's Façades Project is not an infringement of Bestmont's copyright under subsection 32.2(1)(b), as evident by the fact that the Court of Appeal simply said that Besmont was immune. That alone should be enough to agree that Ms. Rer's work is original and as the author of the Façades Project, she owns the copyright arising out of same.

II. Copyright subsists in the Façades Project in both the Unaltered Work and Filtered Work:

A - The Court of Appeal erred in applying the originality test on Ms. Rer's work:

29. The Court of Appeal erred in concluding that the Trial Judge's test for originality is too low. The Court finds that the bulk of originality in the photos is the result of Bestmont's artistic efforts to design its hotels, not the use by Ms. Rer of the same technique and concept for each photo. Similarly, the Court concludes that applying a social media filter to a photograph does not justify copyright on the resulting photographs as there was nothing original about the filters chosen.

30. In *CCH Canadian Ltd. v. Law Society of Upper Canada*¹⁴, the Supreme Court held that the test for originality is a low one as it requires no minimal degree of creativity¹⁵. The Court rejected the creativity standard, which implies that a work should be novel or non-obvious, and instead adopted a standard requiring the exercise of skill and judgment in the production of a work. Creativity is thus not required to make a work "original", and neither does it needs to demonstrate any particular artistic qualities¹⁶.

31. In fact, for a copyright to subsist, it is enough "that the work is the production of something in a new form as a result of the skill, labour and judgment of the author"¹⁷. Ms.

¹⁴ *CCH Canadian Ltd. v Law Society of Upper Canada*, [2004] 1 S.C.R. 339 [*CCH*].

¹⁵ *Ibid.*, at para 22.

¹⁶ *Ibid.*, at paras 22-25.

¹⁷ Neal Armstrong, The Honourable Roger T. Hughes, Susan J. Peacock, *Hughes on Copyright and Industrial Design*, 2nd ed (New York: LexisNexis, 1985), at 341-342.

Rer's photographs are certainly a new form of representation of Bestmont's facades, and the fact that Bestmont's designs are the focus of the photographs does not in any way take away the photographs' originality.

32. When it comes to photography, "skill and judgment" can be appreciated through elements such as the angle of the shot, lighting effects, framing, costumes, location, duration of the shoot, etc¹⁸. A photograph can also exhibit originality through the particular angle and point of view taken by the photographer, as well as the artistic work and personal effort of the photographer¹⁹.
33. The use of one's skill means the use of knowledge "developed aptitude or practiced ability in producing the work", while 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"²⁰.
34. Additionally, the fact that a photographer follows a standardized procedure to take photographs does not exclude the use of their skill and judgment in taking them, nor does it reduce it to a simple mechanical exercise.²¹

B - Ms. Rer exercised skill and judgment during the entire production process of her work, conferring copyright protection to the whole project

1. Unaltered Work

35. The trial evidence demonstrates that Ms. Rer spent a year traveling to photograph each of Bestmont hotels' marquees at a specific distance of 100 feet, with the marquee centered in the frame so that it would be "prominently featured as the focus of the photograph, while still depicting the unique design features of each hotel's facade"²². The trial evidence also

¹⁸ *Ateliers Tango argentin inc. c. Festival d'Espagne et d'Amérique latine inc.*, [1997] R.J.Q. 3030 (C.S.), para 44 [*Ateliers Tango*].

¹⁹ *Ibid.*, at para 39.

²⁰ *Ibid.*, at para 16.

²¹ *Trader Corp. v CarGurus Inc.*, 2017 ONSC 1841, at paras 18-24.

²² *Trial Court Judgment*, *supra* note 2 at para 4.

indicates that the same technique and camera set-up was used for each photograph in order to achieve a specific purpose: to create a contrast between the similarities and differences in the design and atmosphere of each hotel²³.

36. Consequently, there is no doubt that Ms. Rer's photographs constitute original works. Ms. Rer's efforts in creating the Façades Project should be considered, as she traveled for a whole year at her own expense to stay in each of Bestmont's hotels in order to take the photographs for her project.
37. Additionally, Ms. Rer certainly used her skill and judgment. She has been traveling the world as a photographer and social media influencer, and she undoubtedly made use of her developed aptitude and acquired knowledge in producing these photographs.
38. By choosing to take each photographs at a distance of 100 feet in order to allow the marquee to be the focus of the photograph, and by repeating this process for each photograph, Ms. Rer used her own discernment and ability to form an opinion, and she thus undoubtedly used her skill and judgment to create original works. Ms. Rer could have taken her photographs at a further distance or, on the contrary, she could have taken a much closer shot of each of the marquees to focus on the different details of their designs. She could also have chosen to photograph each marquee from a different angle, but she specifically chose to use the same technique for each hotel to create a precise effect, namely, to highlight the differences and similarities in terms of atmosphere and design.
39. The choice of angle, camera set-up and technique are what makes Ms. Rer's photographs original, and to repeat the same technique for each photograph does not reduce it to a simple mechanical exercise.

²³ *Ibid.*

2. Filtered Work

40. Ms. Rer applied four filters on each of her original photographs, namely filters known as “*sepia*”, “*oil painting*”, “*pixilation*”, and “*pencil drawing*”, which she chose for their popularity and for the effect they would have on the photographs.
41. She selected these filters based on her experience as a photographer and social media influencer and according to their popularity and effect, which clearly demonstrates skill and judgment.
42. Furthermore, the fact that there is nothing original about the choice of filters, as stated by the Court of Appeal²⁴, does not hinder the originality of the filtered photographs as no “minimal degree of creativity” and artistic qualities is necessary for a work to be original²⁵.
43. The filtered photographs thus meet the originality criteria established by the jurisprudence. In short, what makes a photograph original is “the totality of the precise lighting selection, angle of the camera, lens and filter selection”²⁶.

ISSUE II: BESTMONT’S INFRINGEMENT CONSTITUTES A SUBSTANTIAL REPRODUCTION OF THE COPYRIGHTED WORKS

I. Qualification of the reproduction done by Bestmont

A - Bestmont reproduced Ms. Rer’s photographs:

44. Section 3(1) of the *Act* protects the financial interests of the owner of a copyright who has the sole right to reproduce all or part of their work. This exclusive right may be the most important component of copyright law. The main reason for this is to enable authors to profit from their work as clearly stated in the case *Théberge v Galerie du Petit Champlain*

²⁴ *Appeal*, *supra* note 4 at para 5.

²⁵ *CCH*, *supra* note 15 at para 22.

²⁶ *SHL Imaging, Inc. v Artisan House, Inc.*, 117 F. Supp. 2d 301, 306 (S.D.N.Y. 2000).

*inc*²⁷, and again, by author J. Herman: “*Copyright confers in the creator a monopoly to exploit his work in public for his own economic self-interest*”²⁸.

45. The word “reproduced” is the act of producing new copies of the work in any material form. Moreover, for a work to be considered reproduced, two key elements must be demonstrated: resemblance to the original copyrighted work, and a causal connection between the copyrighted and the infringing work²⁹.

46. In the present matter, the reproduction of Ms. Rer’s Façades Project by Bestmont is obvious. Not only has Bestmont used Ms. Rer digital copies of her photographs after having refused her licensing offer, but Bestmont also admitted to having reproduced the Unaltered Work. Hence, this reproduction can only constitute infringement³⁰ under sections 3(1) and 27(1) of the Act³¹, as determined by the Trial Judge.

47. As for the Filtered Work, the Trial Judge found that Bestmont’s filtered images were “clearly inspired” by Ms. Rer Filtered Work³². While Bestmont used a different photo editing software to recreate the effect rendered by Ms. Rer’s filters, they are highly similar, Bestmont’s choice of filters, namely “*sepia*”, “*oil painting*”, “*pixilation*”, and “*pencil drawing*”, is certainly not a random and was meant to reproduce the final result achieved by Ms. Rer. The resemblance between Ms. Rer’s Filtered Photos with the new enhanced photos made by Bestmont is rather overwhelming and sufficiently great to constitute reproduction.

²⁷ *Théberge v Galerie du Petit Champlain inc* [2002], 17 CPR (4th) 161 (SCC) - at para 141.

²⁸ J. Herman, “Moral Rights and Canadian Copyright Reform: The Impact on Motion Picture Creators” (1989-1990), 20 R.D.U.S. 407, at 411.

²⁹ *Francis Day & Hunter Ltd. v Bron* [1963] 2WLR 868

³⁰ *Trial Court Judgement*, *supra* note 2 at para 19.

³¹ *Copyright Act*, *supra* note 1 at ss 13(1), 3(1).

³² *Trial Court Judgement*, *supra* note 2 at para 19.

B - The copying of Ms. Rer can be qualified as substantial:

48. The question of substantial reproduction involves a contextual question of facts since “substantial” cannot be defined in precise terms within the *Act*. Justice Richard in *U & R Tax Services Ltd. v H & R Block Canada Inc.*³³ stated that the reproduction of a substantial part is a question of fact in which the Court shall consider whether the alleged infringer has taken the distinct traits, the essential features and substance of the copied work.
49. The jurisprudence assessment for substantiality has evolved towards a qualitative test instead of a quantitative one³⁴: “*It will, therefore, depend, not merely on the physical amount of the reproduction, but on the substantial significance of that which is taken*”³⁵.
50. The test requires that there be a substantial similarity between the original work and the infringing work when both are viewed as a whole. In other words, it is the cumulative effect of the copied features that will determine whether a substantial part of the author’s skill and judgment has been reproduced³⁶.
51. When it comes to the qualification of substantial reproduction of the Filtered Work, the question of whether there has been an “unfair copying” of a work in the creation process of another must be asked. The appropriation of the intellectual labour of an author, its skills, time and talent is constitutive of an infringement in a qualitative point of view^{37 38}.
52. In *U & R Tax Services*³⁹, Justice Richard provided a non-exhaustive list of elements to be considered when analyzing if a substantial part of the work has been copied, such as whether the defendant intentionally appropriated the plaintiff’s work to save time and effort.

³³ *U & R Tax Services Ltd. v H & R Block Canada Inc.* [1995], 62 C.P.R. (3d) 257 (F.C.T.D.), at pages 268-269 [*U & R Tax Services*].

³⁴ *Ladbroke (football) Ltd v William Hill (football) Ltd.* [1964] 1 W.L.R 273 H.L., at page 283.

³⁵ *Compagnie Générale des Établissements Michelin--Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* [1997] 2 F.C. 306 (T.D.), at para 50.

³⁶ *Cinar Corporation v Robinson*, 2013 SCC 73, at paras 26, 35-36.

³⁷ *Breen v Hancock House Publishers Ltd.* [1985] 6 C.I.P.R. 129 (Fed T.D).

³⁸ *L.B. (Plastics Ltd. v Swish Products Ltd.* [1979] RPC 551 (H.L).

³⁹ *U & R Tax Services*, *supra* note 30 at para 35.

53. Bestmont's use of a different software to reproduce the same effects found in Ms. Rer's Filtered Work, as mentioned above, definitely speaks to their intent to substantially recreate Ms. Rer's Filtered Work on top of the mere fact that Bestmont used Ms. Rer Façades Project after having refused her offer.
54. Bestmont could have produced its own series of photographs through the use of a hired photographer or could have decided to buy local Art. Rather, Bestmont chose to reproduce Ms. Rer's Façades Project to save time, effort and money.
55. As for Bestmont' reproduction of the Unaltered Work, its admission is sufficient to qualify the reproduction as substantial⁴⁰.
56. Accordingly, the Court of Appeal erred in determining that even if there is copyright in the individual Filtered Work, the small amount of originality involved does not justify broad protection, and Bestmont's use of a different filter of the same type is not a substantial reproduction of that originality.
57. This substantial reproduction of Ms. Rer's Unaltered and Filtered Works thus constitutes an infringement of her copyrights as per section 3(1) of the *Act*.

II. The Court of Appeal erred in qualify the use of the Façades Project by Bestmont as not commercial

A - The displaying of the infringed Photographs benefited Bestmont's business:

58. The term "commercial" has been qualified in both the Oxford Dictionary and Cambridge Dictionary as "*Connected with the buying and selling of goods and services*", and as "*making or intended to make a profit*". A key element to the present matter.
59. Pursuant section 38.1(1)(a) of the *Act*, when it comes to awarding statutory damages, the monetary range is significantly higher if the infringement is of a commercial nature. In

⁴⁰ *Trial Court Judgement, supra* note 2 at para 19.

*Trader v. CarGurus*⁴¹, Justice Conway qualified CarCarguru use of Trader’s photographs as commercial since “*The nature of the works is commercial photography, which is being used to further CarGurus’ commercial interests*”. In *Thomson v Afterlife Network Inc*, the intention for profit was also a defining factor in the qualification of an infringement as being commercial⁴².

60. Bestmont, in addition to selling rooms for its customers to stay in, also sells the ambiance and curated designs of its hotels. This is precisely why Bestmont is considered a luxury chain. Guests also pay to experience luxury, comfort and high-end decor.

61. Consequently, by displaying Ms. Rer’s work in the hallway of its guest floors, Bestmont enriched its hotels’ decoration, contributing to the customer’s experience. By doing so, the intent was to use the photographs with a profitable goal.

62. Hence, a company using copyrighted art in the course of its business, for its clients and for the purpose of generating revenue, ought to be considered as commercially oriented behaviour.

63. The Trial Judge, in his conclusions, rightly stated that Bestmont infringement had commercial purpose given that the display of the reproductions enhanced the atmosphere of the stay of its paying guests.

B - It is not necessary to prove that additional revenues have been generated from the infringement to apply the commercial qualification:

64. The Court of Appeal justified its decision to not qualify Bestmont’s infringement as commercial with the lack of evidence that Bestmont use of Ms. Rer’s Façades Project generated quantifiable revenues. Without the proof of discernible financial benefits the Appeal Judge concluded that the infringement could not be commercial, and could not open compensation on the higher statutory range offered to commercial infringement.

⁴¹ *Trader v CarGurus* [2017] ONSC 1841, at paras 38, 39.

⁴² *Thomson v Afterlife Network Inc* [2019] FC 545, at para 62.

65. However, the subsequent financial consequences of an infringement do not have to be taken into account when qualifying the infringement as commercial. In fact, an insignificant amount, or even the lack thereof cannot prevent such a qualification.
66. In *Royal Conservatory of Music v Macintosh*⁴³, the Judge found that the infringement was commercial in nature, as the litigious books were being sold commercially, presumably to as wide an audience as possible – even if the ultimate sales were very modest.
67. A similar issue occurred in *Collett v Northland Art Company Canada* where Justice Gleeson awarded the maximum amount of \$20,000 for statutory damages for a part of the infringed work against Northland Art Company. In this case, the fact that Mr. Collett could not provide evidence that Northland actually profited from the infringement was not considered to be an obstacle in the qualification of the commercial nature⁴⁴.
68. Justice Gleeson justified his decision by stating that “*that the infringements in this circumstance were for commercial purposes, however there is no evidence before me of the profits, if any, generated as a result of the infringing activity. In the circumstances I am required to arrive at a reasonable assessment of statutory damages in all of the circumstances*”
69. The case law is clear: qualification of a commercial nature of an infringement has nothing to do with the profit or revenue generated by the said infringement^{45 46}. Only the intention of profit, the goal to financial gain is considered in the qualification of the commercial nature of the infringement.
70. Consequently, the argument put forward by Bestmont that it did not generate any revenue from displaying Ms. Rer’s Work is irrelevant. The Court of Appeal wrongfully based its conclusion on that absence of profit.

⁴³ *Royal Conservatory of Music v Macintosh (Novus Via Music Group Inc.)* [2016] FC929, at para 112.

⁴⁴ *Collett v Northland Art Company Canada Inc.* [2018] FC269, at para 59 [Collett].

⁴⁵ *Century 21 Canada Limited Partnership v Rogers Communications Inc.* [2011] BCSC 1196, at para 218 [Century 21 Canada]

⁴⁶ *Young v Thakur* [2019] FC 835, at paras 45, 63 [Young].

ISSUE III: AWARD OF STATUTORY DAMAGES

I. The award of the maximum amount of \$20,000 for statutory damages is not grossly out of proportion to the infringement

A - The Trial Judge rightfully awarded the maximum amount:

71. Subsection 38.1(5) identifies factors to take into consideration when assessing statutory damages, namely the bad faith of the respondent, the conduct of the parties before and during the proceedings and the need to deter further similar infringements.
72. In *Wing v Velthuisen*⁴⁷, it is expressly said that, when exercising its discretion toward statutory damages, the Court should “*consider all relevant factors, including the good faith or bad faith of the defendant, the conduct of the parties before and during the proceedings, and the need to deter other infringements of the copyright in question*”.
73. The purpose of statutory damages is to ease the evidentiary burden on a copyright owner, for whom it may be difficult to prove the extent of the loss of profit⁴⁸. Determining a right amount can prove an arduous process and is not an “exact science, and not even a calculation”⁴⁹. In fact, statutory damages should be evaluated on a case by case assessment, considering all relevant circumstances in order to achieve a just result⁵⁰.
74. When analyzing Bestmont’s conduct towards Ms. Rer, first when she approached Bestmont with a licensing offer, and then after it turned it down, it is rather clear that Bestmont’s behavior was less than agreeable. Bestmont repeatedly refused to give Ms. Rer her portable drive and refused to respond when she demanded the removal of her reproduced work.

⁴⁷ *Wing v Velthuisen* [2000] 16609 (FC), at para 69.

⁴⁸ *Copyright Act*, s. 38(5); *Rallysport Direct LLC v 2424508 Ontario Ltd.* [2020] FC 794, at para 6.

⁴⁹ *Century 21 Canada*, *supra* note 43 at para 387 - citing *Pinewood Recording Studios Ltd v City Tower Development Corp* [1996], 31 CLR (2d) 1.

⁵⁰ *Ontario Limited v 1833326 Ontario Limited* [2020] ONSC 1041, at para 100; *Collett*, *supra* note 41 at para 59.

75. In conclusion, considering the foregoing and the fact that there is a dramatic power imbalance between the two parties, it is only right to consider awarding the maximum amount of statutory damages allowed by the law, as per subsection 38.1(1)(a) of the *Act*.

76. In view of the commercial use Bestmont has made of the photos, an award of \$20,000 per infringed work seems fitting to the circumstances: the scope of the infringement is substantial and the influential position Bestmont enjoys within the hospitality industry justify awarding damages at the higher end of the bracket.

B - The Appeal Judge unjustly cut back the initial range and wrongly applied subsection 38.1(3) of the Act:

77. The Appeal Judge motivated his decision of reducing the amount of statutory damages pursuant to subsection 38.1(3) of the *Act* by the fact that the Trial judge found infringement of multiple work reproduced on the same medium. The Courts have agreed that in order to consider whether the circumstances warrant a lower amount, one must show that there is more than one work in a single medium and where awarding the minimum per work would yield a total award grossly out of proportion to the infringement⁵¹. It is the defendants that have the burden of establishing that a certain award would grossly out of proportion to the infringement⁵².

78. Professor Goldstein⁵³, cited in *Telewizja*, analyzed the concept of multiple works in cases where action involves infringement of more than one separate and independent work and concluded that the accepted test is whether each work has an independent economic value and is, in and of itself, viable.

⁵¹ *Telewizja Polsat S.A v Radiopol Inc* [2006], FC 584, at para 38 and 39 [*Telewizja*].

⁵² *Rallysport Direct LLC v 2424508 Ontario Ltd.* [2020] FC 794

⁵³ Paul Goldstein, *Goldstein on Copyright*, 3rd ed (New York: Aspen Publishers, 2005), at 14-52 to 14-56.

79. To furthermore support this test, John McKeown advocated as well that if a defendant copies several different works the plaintiff is entitled to statutory damages for each work infringed⁵⁴.
80. Jurisprudence has established that a work-based award is more consistent with the wording of section 38.1(1) of the *Act*: “*each work or other subject matter*”⁵⁵.
81. Moreover, when it comes to judging whether the amount awarded per work would be out of proportion, the jurisprudence has proven to be adopting a protective attitude towards the most financially weak party. When considering the factor of the award for each work or altogether, Justice Harrington considered that the damages would be grossly out of proportion to the plaintiff, in the sense that it would be far too low⁵⁶.
82. In *Louis Vuitton Malletier S.A. v. Yang*, Justice Snider concluded that the maximum statutory award of \$10,000 for each of the discrete acts of infringement of the copyrighted works was appropriate: “*I am satisfied that the maximum award of statutory damages in the amount of \$20,000 for each of the two Copyright Works is appropriate. Given that there are two Copyrighted Works, the total amount to be awarded is \$40,000*”⁵⁷.
83. In all those cases, the attitude of the infringing party and their bad faith was a key element to awarding statutory damages for each infringed work individually. Bestmont’s actions were in bad faith, and its financially advantageous position compared to that of Ms. Rer should be considered altogether.
84. In view of the foregoing, the Appeal Judge erred in his application of subsection 38.1(3) of the *Act* and should not have concluded that the amount was disproportionate and should be reduced. The statutory damages should be awarded for each of Ms. Rer’s work, and not only for the Façades Project as a whole.

⁵⁴ *Telewizja*, *supra* note 50 at para 45; John McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed (Toronto: Thomson Reuters, 2003), at 24-77.

⁵⁵ *Nintendo of America Inc. v. King*, 2017 FC 246 (CanLII), [2018] 1 FCR 509, at para 138.

⁵⁶ *Microsoft Corporation v. 9038-3746 Quebec Inc.* [2006] FC 1509 (CanLII) at paras 105, 110.

⁵⁷ *Louis Vuitton Malletier S.A. v. Yang* [2007] FC 1179 (CanLII), at para 26.

II. The need for deterrence highlighted by the Trial judge pursuant 38.1(7) of the Act is warranted

85. Statutory damages are not awarded in order to compensate Ms. Rer, but to restore the status quo and “*put the plaintiff in the position it would have been in had it not been wronged by the Defendants*”⁵⁸.
86. However, when the infringing party displayed a “*malicious behaviour, oppressive and high-handed misconduct, that offends the court’s sense of decency*”⁵⁹, it is a social necessity to punish and condemn such behaviour in an objective of deterrence. As a whole, the misconduct and bad faith of the defendant must represent a marked departure from ordinary standards of decent behavior, and should be analyzed and put to test^{60 61}.
87. The conduct of Bestmont in exploiting Ms. Rer copyright for financial gain was planned and deliberate such that Bestmont’s intention was to make money in the course of its business without having to pay an appropriate license fee to Ms. Rer, despite clearly having an interest in her Façades Project. What is more, Bestmont cavalieri persisted in its deceptive conduct by refusing to return Ms. Rer’s portable drive containing the digital versions of her work and by systematically refusing to speak with her, in an effort to scare her off.
88. The need to prevent such demeanour in the future by increasing the statutory damages beyond their usual range is not uncommon in cases of Copyright Infringement⁶², with some amount reaching substantial sums⁶³.
89. The Trial judge rightfully increased the statutory damages by \$500,000 pursuant subsection 38.1(7) of *Act*, in an effort to sanction Bestmont’s brazen behaviour and bad faith, and to deter similar conduct in the future.

⁵⁸ *Microsoft Corp v 9038-3746 Québec Inc.* [2007], 57 C.P.R (4th) 204 (F.C.T.D), at para 103.

⁵⁹ *Hill v Church of Scientology of Toronto* [1995], 2 S.C.R. 1130, at para 196.

⁶⁰ *Whiten v Pilot Insurance Co.* [2002] SCC 18 (CanLII), [2002] 1 SCR 595 (S.C.C), at para 36.

⁶¹ *Microsoft Corporation v Liu*, [2016] FC 950 [Liu] at para 27.

⁶² *Profekta International Inc. v Lee* [1997], 75 C.P.R (3rd) 369 (fed C.A).

⁶³ *Evocation Publishings Corp. v Hamilton* [2002] BCSC 1797, 24 C.P.R (4th) 52.

PART V - ORDER REQUESTED

Based on the foregoing, the Appellant respectfully requests the Court of Appeal's decision to be reversed and the Trial Court's decision to be reinstated.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 11th day of January 2022

Team 4

Counsel for the Appellant

PART VI - TABLE OF AUTHORITIES

AUTHORITY	PINPOINT	IN FACTUM
LEGISLATION		
Copyright Act, RSC 1985, c C-42.	s. 38.1, s 5(1), s 32.2(1)(b)(i), s 13(1), s 38.1(1)(a), s 38.1 (7),	
JURISPRUDENCE: CANADA		
<i>Ateliers Tango argentin inc. c. Festival d'Espagne et d'Amérique latine inc.</i> , [1997] R.J.Q. 3030 (C.S.).	paras 16, 44, 39	32, 33
<i>Bestmont Hotels v Wanda Rer</i> , 2021 CAIP 333 [Appeal]	paras 1-10, 6	20, 42
<i>Breen v Hancock House Publishers Ltd.</i> [1985] 6 C.I.P.R. 129 (Fed T.D).		51
<i>CCH Canadian Ltd. v Law Society of Upper Canada</i> , [2004] 1 S.C.R. 339.	paras 22, 22-25	30, 42
<i>Century 21 Canada Limited Partnership v Rogers Communications Inc.</i> [2011] BCSC 1196.	paras 218, 387	69, 73
<i>Cinar Corporation v Robinson</i> [2013] SCC 73.	paras 26, 35-36	50
<i>Collett v Northland Art Company Canada Inc.</i> [2018] FC269.	para 59	67, 73
<i>Compagnie Générale des Établissements Michelin--Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)</i> [1997] 2 F.C. 306 (T.D.).	para 50	49
<i>Dubois v Systèmes de Gestion et d'Analyse de Données Média/Média-Source Canada Inc.</i> [1991], 41 C.P.R. (3d) 92 (Que. S.C.).		24
<i>Evocation Publishings Corp. v Hamilton</i> [2002] BCSC 1797, 24 C.P.R. (4th) 52.		88
<i>Films Rachel Inc. v Duker & Associés Inc</i> [1995], Doc C.S Montréal 500-11-001622-931 (Que. S.C)	para 22	1
<i>Francis Day & Hunter Ltd. v Bron</i> [1963] 2WLR 868.		45
<i>Hill v Church of Scientology of Toronto</i> [1995], 2 S.C.R. 1130.	para 196	86
<i>Ladbroke (football) Ltd v William Hill (football) Ltd.</i> [1964] 1 W.L.R 273 H.L.	page 283	49
<i>Louis Vuitton Malletier S.A. v. Yang</i> [2007] FC 1179 (CanLII)	para 26	82

<i>Microsoft Corporation v. 9038-3746 Quebec Inc. [2006] FC 1509 (CanLII)</i>	paras 105, 110	81
<i>Microsoft Corp v 9038-3746 Québec Inc. [2007], 57 C.P.R (4th) 204 (F.C.T.D).</i>	para 103	85
<i>Microsoft Corporation v Liu, 2016 FC 950.</i>	para 27	86
<i>Nintendo of America Inc. v. King, 2017 FC 246 (CanLII), [2018] 1 FCR 509</i>	para 138	80
<i>Ontario Limited v 1833326 Ontario Limited [2020] ONSC 1041.</i>	para 100	73
<i>Profekta International Inc. v Lee [1997], 75 C.P.R (3rd) 369 (fed C.A).</i>		88
<i>Rallysport Direct LLC v 2424508 Ontario Ltd. [2020] FC 794.</i>	para 6	73, 77
<i>Royal Conservatory of Music v Macintosh (Novus Via Music Group Inc.) [2016] FC929.</i>	para 112	66
<i>Telewizja Polsat S.A v Radiopol Inc [2006], FC 584.</i>	paras 38, 39, 54	77, 79
<i>Théberge v Galerie du Petit Champlain inc [2002], 17 CPR (4th) 161 (SCC).</i>	para 141	44
<i>Thomson v Afterlife Network Inc [2019] FC 545.</i>	para 62	59
<i>Trader Corp. v CarGurus Inc., 2017 ONSC 1841.</i>	paras 18-24, 38, 39	354, 59
<i>U & R Tax Services Ltd. v H & R Block Canada Inc. [1995], 62 C.P.R. (3d) 257 (F.C.T.D.).</i>	pages 268-269	48, 52
<i>Wanda Rer v Bestmont Hotels, 21 TCCIP 1222 [Trial Court Judgment].</i>	paras 4, 9, 10, 11, 19	10, 35, 46, 55
<i>Whiten v Pilot Insurance Co., 2002 SCC 18 (CanLII), [2002] 1 SCR 595.</i>	para 36	86
<i>Wing v Velthuisen [2000] 16609 (FC).</i>	paras 69	72
<i>Young v Thakur [2019] FC 835.</i>	paras 45, 63	69

JURISPRUDENCE: FOREIGN		
<i>L.B. (Plastics Ltd. v Swish Products Ltd. [1979] RPC 551 (H.L).</i>		51
<i>SHL Imaging, Inc. v Artisan House, Inc., 117 F. Supp. 2d 301, 306 (S.D.N.Y. 2000).</i>		43
<i>University of London Press Ltd. v University Tutorial Press Ltd [1916], 2 Ch. 601.</i>	page 608	24

SECONDARY MATERIALS		
Oxford English Dictionary, online edition.	<i>Sup verbo</i>	58

	“commercial”	
Cambridge English Dictionary, online edition.	<i>Sup verbo</i> “commercial”	58
Herman, J. “Moral Rights and Canadian Copyright Reform: The Impact on Motion Picture Creators” (1989-1990), 20 R.D.U.S. 407.	page 411	44
Goldstein, Paul. <i>Goldstein on Copyright</i> , 3rd ed (New York: Aspen Publishers, 2005).	pages 14-52 to 14-56	78
McKeown, John. <i>Fox Canadian Law of Copyright and Industrial Designs</i> , 4th ed (Toronto: Thomson Reuters, 2003).	pages 24-77	66
Sookman, Barry, Mason, Steven and Craig Carys, <i>Copyright: Cases and commentary on the Canadian and International Law</i> , 2nd ed. (Toronto: Thomson Reuters, 2013).	pages 437, 691-718, 766-783, 1268	23
McKeown, John. <i>Fox Canadian Law of Copyright and Industrial Designs</i> , 2nd ed. (Toronto: Carswell, 1967).	page 239	24
Armstrong, Neal, Hughes, Roger T. and Peackon, Susan J. <i>Hughes on Copyright and Industrial Design</i> , 2nd ed (New York: LexisNexis, 1985).	pages 341-342	31