

Competition Year: 2022

Team: 4R

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] The Courts have consistently held that the facts of each case should be analyzed independently. This case is about the Appellant’s improper attempt to use the *Copyright Act* (“**Act**”)¹ to claim an excessive amount of damages from a corporation after it rejected its license proposal. The *Act* was never intended to protect works that used a trivial amount of originality and limit the scope of copyright rights that architectural design owners have. Therefore, the Appellant’s appeal to use the *Act* to substitute the loss of revenue for damages should not succeed.

[2] The Respondent, Bestmont Hotels (“**Bestmont**”), is a well-established luxury hotel chain. After rejecting the Appellant’s license proposal, it used its photographs and applied its own set of filters on them to decorate its hotels’ hallways.

[3] The Appellant, Wanda Rer (“**Ms. Rer**”), is a self-described artist, photographer, and social media creator. Her job led her to travel for a whole year and stay at each Bestmont destination across Canada. She found inspiration from Bestmont's hotels' unique architecture and especially the very famous red marquees that adorn the entrance to each one of its ten (10) Canadian locations. Therefore, while staying at each hotel, she placed herself at 100 feet from the hotel's door entrance and took a photograph. She subsequently added social media filters to these photographs to create a total of fifty (50) photographs with the sole purpose of making the Façade Project (“**Façade Project**”) that she offered the license to Bestmont.

[4] Ms. Rer now seeks a large quantum of damages stating that Bestmont infringed the copyright in her photographs after her offer was rejected for genuine reasons. These damages cannot be awarded for three key reasons.

¹ RSC 1985, c C-42.

[5] First, copyright does not subsist in the ten (10) photographs (“**Original Works**”) that Ms. Rer took at 100 feet from the entrance of each of Bestmont’s destinations nor in the forty (40) additional photographs (“**Filtered Works**”) that she created by adding simple filters. Ms. Rer did not exercise sufficient skill and judgement in creating them. All of her manoeuvres were trivial and mechanical. Therefore, Ms. Rer doesn’t have any copyright in any work at issue in this appeal.

[6] Second, even if copyright were to subsist in Ms. Rer’s Original and Filtered Works, Bestmont did not infringe her copyright. Bestmont, as the owner of the copyright in the architectural design of its hotels and in the marquees, had the right to reproduce same in any form in accordance with section 3(1) of the *Act*. In addition, Ms. Rer cannot rely on the exception of section 32.2(1)(b) of the *Act* since it does not allow offering the license to Bestmont.

[7] Finally, in relation to damages, if there is a copyright infringement, which Bestmont strongly denies, the Respondent submits that section 38.1(b) of the *Act* should apply instead of section 38.1(1)(a) and 38.1(7) of the *Act*. As the Court of Appeal adequately stated, Bestmont used the photographs for non-commercial purposes and was in good faith.

[8] In sum, the Court should affirm the Court of Appeal’s decision that copyright does not subsists in all the Original and Filtered Works. Bestmont did not infringe any copyright and should not pay damages.

PART II – STATEMENT OF FACTS

A. The Parties

[9] Bestmont is a well-established luxury hotel chain in Canada. Ms. Rer acknowledges that Bestmont’s hotels have a unique architecture, including a red marquee that is, in fact, famous and instantly recognizable by most Canadians².

² *Rer v Bestmont Hotels*, 2021 TCCIP 1222 at para 1 [*Trial*]

[10] Ms. Rer is a self-described artist, photographer and social media influencer that has a strong following. Ms. Rer travelled across the world for an entire year to stay at each of Bestmont's luxury destinations in order to create her Façade Project³.

B. Ms. Rer's Façade Project

[11] Through her year of travelling, Ms. Rer created the Façade Project which was based on the uniqueness of Bestmont's hotel architecture. Her Façade Project involved taking photographs of each of Bestmont's hotel destination at exactly 100 feet from the hotel with Bestmont's unique red marquee of the hotels in its center.

[12] The exact technique and camera set-up were applied by Ms. Rer to take the ten (10) Original Works⁴.

[13] From these Original Works, Ms. Rer then applied commonly used filters known as 'sepia,' 'oil painting,' 'pixilation,' and 'pencil drawing' from a social media platform to her images to create an additional forty (40) Filtered Works⁵.

[14] Ms. Rer subsequently approached Bestmont to offer a license of \$3,000.00 per image for the use of the Façade Project which ultimately was a reproduction of the architectural design of Bestmont's hotels. As part of a promotional package, Ms. Rer prepared high-resolution photographs of the Façade Project which was given to Bestmont on a portable USB drive⁶.

C. Bestmont's copyright on its marquee

[15] Bestmont rejected Ms. Rer's offer and instead accused her of infringing Bestmont's copyright in its marquee and hotel designs. It has a registered Canadian copyright in each of its

³ *Ibid* at para 3.

⁴ *Ibid* at para 4.

⁵ *Ibid* at para 5.

⁶ *Ibid* at para 6-7.

hotels entrances and its marquee's design which gives Bestmont the exclusive right to reproduce as it wishes said copyright, which is what it did⁷.

[16] Bestmont used the Original Works in the Façade project to decorate the hallways of its guest floors as well as applied its own set of filters from a different editing software, namely 'sepia,' 'oil painting,' 'pixilation,' and 'pencil drawing'. Bestmont also asked Ms. Rer to destroy all copies of the Façade Project as they were unauthorized reproductions of Bestmont's registered copyrights⁸.

[17] Bestmont has since removed the photographs that Ms. Rer claims are infringing her rights in the Façade Project from its hotels.

D. The Trial Court Decision

[18] The Trial Court held that Ms. Rer exercised enough skill and judgment in taking her photographs to warrant copyright protection under section 5(1) of the *Act* for each Original Works and Filtered Works despite Ms. Rer using the same camera set-up for each photograph and having applied pre-made filters⁹.

[19] Given that the Trial Court found that a copyright subsisted in the Façade Project, it concluded that Bestmont did in fact infringe and that its actions were in bad faith and for commercial use¹⁰.

[20] Therefore, for the quantum of damages, the Trial Court awarded statutory and punitive damages in the amount \$1,500,000 pursuant to sections 38.1(1)(a) and 38.1(7) of the *Act*. Punitive

⁷ *Ibid* at para 10.

⁸ *Ibid* at para 8.

⁹ *Ibid* at para 16.

¹⁰ *Ibid* at para 19-21.

damages were granted by the Trial Court at its own discretion despite Ms. Rer having not plead punitive damages as a separate basis of relief¹¹.

E. The Decision of the Court of Appeal

[21] On September 15, 2021, The Court of Appeal overturned the Trial Court of Canada's decision.

[22] The Court of Appeal found that the Trial Judge's test for originality was too low since Ms. Rer only exercised her skill and judgement once: the same technique and concept was used for all her photographs. Therefore, if there is any copyright of the Original Works, they should be analyzed as a whole¹².

[23] The Court of Appeal also held that the Filtered Works should not warrant copyright protection as they were readily available and unoriginal. The Court emphasized that an infinitesimal amount of originality should not justify the broad protection at section 5(1) of the *Act*.

[24] As for the copyright infringement, the Court mentions that Bestmont has the right to reproduce its architecture and that 32.2(1)(b) of the *Act* cannot be relied on since Ms. Rer asserts copyright against the Bestmont who is in fact the copyright owner in the underlying work¹³.

[25] Lastly, the Court of Appeal emphasized that the Trial judge "threw the book" at Bestmont while awarding damages. There was no reason to award punitive damages to Ms. Rer as Bestmont was not in bad faith, and it was not pleaded as a separate relief. In addition, the Court held that the awarding of statutory damages was grossly out of proportion to the infraction since Bestmont used the pictures for a non-commercial purpose, such that section 38.1(b) of the *Act* should apply. Rather, since the Trial Court found infringement of multiple work produced in the same medium,

¹¹ *Ibid* at para 26.

¹² *Bestmont v Rer*, 2021 CAIP 333 at para. 5 [*Appeal*].

¹³ *Ibid* at para 3.

the Trial Judge should have applied section 38.1(3) of the *Act* to reduce the award. The Court of Appeal stated that a more reasonable amount, if there was infringement, would have been \$15,000¹⁴.

PART III – POINTS IN ISSUE

[26] There are three main issues in this appeal:

1. Whether copyright subsists in each of the Appellant's Original and/or Filtered Works?
2. In the affirmative, whether Bestmont infringed Ms. Rer's copyright in the Original Works despite having registered copyright in the underlying work?
3. If copyright infringement is found, what is the appropriate quantum of statutory damages provided by section 38.1 of the *Act*?

PART IV – ARGUMENTS IN BRIEF

A. Copyright does not subsist in neither Ms. Rer's Original Works nor her Filtered Works

[27] It is respectfully submitted that the Trial Judge erred in finding that Ms. Rer's Original Works and Filtered Works are original. In order for a work to benefit from the protection provided by the *Act*, not only must it belong to one of the four main categories expressly established in the *Act* (artistic, literary, dramatic or musical work), but it must also qualify as being an original work in accordance with section 5(1) of the *Act*. In view of Ms. Rer's allegations and the analysis hereunder of the originality criteria, Ms. Rer's Original and Filtered Works are not protected by copyright under the *Act*.

¹⁴ *Ibid* at para 8-9.

(a) **The Trial Judge erred in finding that copyright subsists in the Original Works and the Filtered Works**

[28] The Supreme Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada* (“*CCH*”)¹⁵ defined the notion of originality by a test to which a work belonging to the category of artistic, literary, dramatic, and musical works must be subjected. The test has three key elements, namely:

1. The work originates from its author
2. The work cannot be a mere copy of another work
3. The work is the product of the talent and judgment of its author.¹⁶

[29] For the exercise of skill and judgment required to produce the work, it must not be so trivial that it could be characterized as a “purely mechanical exercise”¹⁷. The exercise of skill and judgement will be appreciated in view of the reproduction, as cited below:

“In determining whether a work [...] has been reproduced, what will be determinative is the extent to which the item said to be a reproduction contains within it, in qualitative rather than quantitative terms, a substantial part of the skill and judgment”¹⁸.

[30] Bestmont submits that Ms. Rer’s Original Works and Filtered Works do not satisfy all three elements of the Originality Test as set out in *CCH*. In fact, not only are Ms. Rer’s Original Works and Filtered Works a mere reproduction of Bestmont’s architectural works, which are protected by copyright, but Ms. Rer has not even exercised sufficient skill and judgement in creating her Original and Filtered Photographs, as correctly concluded by the Court of Appeal.

¹⁵ 2004 SCC 13.

¹⁶ *Ibid* at para 15-16.

¹⁷ *Ibid* at para 16.

¹⁸ *Robertson v Thomson Corp.*, 2006 SCC 43, at para 81, citing *Édutile Inc. v Automobile Protection Assn.*, [2000] 4 F.C. 195 (C.A.), at para. 22

(i) ***Ms. Rer’s Original Works and Filtered Works are mere reproductions of Bestmont’s architectural works***

[31] Ms. Rer infringed the Bestmont’ architectural works, acting beyond the non-infringement exception in section 32.2(1)(b) of the *Act*. Bestmont benefits from copyright protection in its buildings’ designs and marquees. Same having been registered with CIPO. Subsection 32.2(1)(b) reads as follows:

“**32.2 (1)** It is not an infringement of copyright
(b) for any person to reproduce, in a painting, drawing, engraving, photograph or cinematographic work
(i) an architectural work, provided the copy is not in the nature of an architectural drawing or plan, or
(ii) a sculpture or work of artistic craftsmanship or a cast or model of a sculpture or work of artistic craftsmanship, that is permanently situated in a public place or building;”

[32] The act of “reproducing” is crucial to this exception. Generally, the right to reproduce a copyright-protected work belongs to the author of the work in issue. However, section 32.2 allows, in very specific circumstance, the reproductions of work that would normally be qualified as an infringement to the author’s work. In that sense, Ms. Rer had all the rights to take photographs of Bestmont’s architectural works from a public location. However, Ms. Rer photographs would still constitute a reproduction of Bestmont’s copyrighted works; just not a violation of Bestmont’s rights. Thus, the derivative work emanating from this exception cannot be considered as being an original work for the purpose of the *Act*.

[33] Furthermore, the exception of subsection 32.2(1)(b), along with all the other exceptions of the *Act*, should be interpreted restrictively¹⁹. As correctly stated by the Court of Appeal, the

¹⁹ *Michelin - Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada)*, [1996] F.C.J. No. 1685, at para. 64; CÔTÉ (Pierre-André), *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011), p. 535–536.

exception found at section 32.2 only excuses what would otherwise be an act of copyright infringement. It cannot be used with absolute discretion.

[34] As cited above, only the reproduction of a copyrighted work is a permitted act under subsection 32.2(1)(b) of the Copyright Act. The Oxford English dictionary defines the term ‘reproduction’ as “to produce again in the form of a copy; to replicate (a work of art, picture, drawing, etc.), [especially] by means of engraving, photography, scanning or similar digital or mechanical processes”²⁰. This definition is supported by the Courts, acknowledging that reproduction is “the act of producing new copies of [a] work in any material form”²¹. Therefore, Ms. Rer’s Original Works and Filtered Works cannot be qualified as original, since they are mere reproductions of Bestmont’s works.

(ii) Ms. Rer did not exercise sufficient skill and judgement in producing the Original Works

[35] Subsection 5(1) of the *Act* requires a work to fall within one of the four enumerated categories (literary, dramatic, artistic, or musical) and to be original in order for copyright to subsist. Photographs are considered artistic works under the *Act*²². In order for copyright to subsist in a photograph, the author must demonstrate that it is original, notably by the fact that it is not a mere reproduction and that it is the result of the author's talent and judgment²³, which constitutes a question of fact and law²⁴. In photography, this can be demonstrated by the "choice, the

²⁰ *Oxford English Dictionary*, online edition, *sub verbo* “reproduction”.

²¹ *Théberge v Galerie d’Art du Petit Champlain Inc.* 2002 SCC 34, at para 42.

²² *Canadian Admiral Corp. v Rediffusion, Inc.*, 20 C.P.R. 75, p. 405.

²³ *Supra note 15*, at para. 35.

²⁴ *Betaplex inc. v B & A Construction ltée* at para. 37-39 ; *Housen v Nikolaisen* [2002] 2 SCR. 235 ; Normand TAMARO, *Loi sur le droit d'auteur*, 6e éd., Toronto, Thomson Carswell, 2003, p. 171.

arrangement and the pose of the subject, the choice of the angle of shooting and the lighting, finally by the artistic work and the personal effort of the photographer"²⁵.

[36] Ms. Rer has alleged that “a photo was taken directly in front of each of the Bestmont hotels at a distance of 100 feet, with the marquee centered in the frame.” Ms. Rer’s evidence was that this distance was specifically chosen to allow the marquee to be prominently featured as the focus of the photograph, while still depicting the “unique design features of each of the hotel’s façades”²⁶.

[37] In the present case, the mere distanced take of photographs of Bestmont’s does not constitute sufficient evidence of skill and judgement within the meaning of the *Act*. The shots taken by Mrs. Rer are banal, mechanical and lacks artistic effort²⁷.

[38] Photographing the marquee and the hotel shows that the protected works of Bestmont are indeed the object of reproduction by Ms. Rer. If such a degree of originality were recognized, every photograph would deserve protection²⁸.

[39] In today's context, it is incumbent to establish a in a more concrete manner the degree of recognition of originality taking into account the availability of cameras, their easy and even pre-set functionalities. To grant significant protection to simplified shots hinders the principle of protection of the public interest²⁹. Consequently, Ms. Rer’s Original Works are not original within the meaning of paragraph 3(1) of the Act, since Ms. Rer’s evidence is insufficient and therefore fail to demonstrate that the standard of skill and judgement in creating these works is reached.

²⁵ *Ateliers Tango Argentin Inc. v Festival d'Espagne & d'Amérique Latine Inc.*, [1997] R.J.Q. 3030, at para. 39; VITORIA (Mary) et al., *The Modern Law of Copyright and Designs*, 4th ed., 2011, § 3.104.

²⁶ *Supra* note 2 at para 4.

²⁷ *Portraits Rembrandt Itée v. Interdonato (Ikono)* 2019 QCCQ 5878 at para. 25-29.

²⁸ *Drouin (Succession de C te-Drouin) v. Pepin* 2019 QCCS 848 at para. 178 : “On insiste sur les ajustements de la lumi re et de la distance focale, propres   toute photographie. Si le simple ajustement du d part de l'appareil photo permet de qualifier la photographie d'une  uvre, toutes les photographies m riteraient protection.”

²⁹ *Supra* note 21 at para 32.

[40] Moreover, the Court of Appeal was correct in stating that Ms. Rer mechanically repeating the same concept over and over at different hotels ought not to justify copyright in each resulting photograph as a separate work. Ms. Rer alleges that she took photographs of the building designs and marquees of the ten Bestmont hotels in the same manner. Not only are these works in themselves not original, but the practice is repeated and therefore mechanical. The level of intellectual research is not distinguished from one work to another. The idea is expressed in one form, which is being repeated. As specified in *CCH*, the form of expression of the idea is copyright-protected³⁰. Therefore, by not reaching a sufficient degree and judgement to qualify her works as original, any limited skill and judgment that Ms. Rer could have had is for the Façade Project as a whole and not applied to each individual work.

(iii) *Rer did not exercise sufficient skill and judgment in producing the Filtered Works.*

[41] The Respondent submits that the Court of Appeal was correct in ruling that Ms. Rer's photographs on which the « sepia », « oil painting », « pixilation » and « pencil drawing » filters have been applied are not original as they have not met the test for originality in order to benefit from a copyright protection under the Act. The application of these filters on the Original Works do require any level of skill and judgement from the author.

[42] When there is an addition of a purely mechanical operation to a work, the threshold of skill and judgment required for that addition is not meant, since said operation the degree performed is too trivial to warrant copyright protection. As Adobe describes it as an easy process, there are only 4 steps: upload an image, apply a filter, make additional edits, and save said image³¹. The use

³⁰ *Supra* note 15 at para 15.

³¹ Adobe Creative Cloud Express, "How to add a filter to your photo, online: <<https://www.adobe.com/express/feature/image/filter>>.

of popular, accessible, and pre-set filters that are already programmed demonstrates the mechanical process of their application on a photograph.

[43] Accordingly, filters being pre-set and easily accessible on any social media platforms, the mere act of choosing a filter grants unfairly artistic credit to Ms. Rer, knowing that she in no way developed the filters used. The application of a filter corresponds to a purely mechanical practice and therefore lacks originality and therefore, there cannot be any copyright subsisting in the Filtered Works³².

B. Bestmont’s photographs of the Original Works and Filtered Works does not constitute copyright infringement

[44] The Trial Judge erred in finding that Bestmont infringed Rer’s photographs. The Respondent acted within its rights by reproducing on a different medium its building designs and marquees that are protected under the Act. Bestmont’s original works are architectural works, which are defined in section 2 of the Copyright Act as follows:

“2 In this Act,
architectural work means any building or structure or any model of a building or structure; (*oeuvre architecturale*)
[...]
artistic work includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works; (*oeuvre artistique*)
[...].”

[45] By interpreting the abovementioned definitions, the Respondent’s original works are expressed under a material form that constitutes buildings. It has been established that the Respondent’s original works are protected under the Act. Therefore, the Respondent benefits from

³² *Goldi Productions Ltd. v. Bunch*, Court File No.: 15-5800, dated August 1, 2018, at para. 15-16.

copyright as defined in subsection 3(1), which is considered as a derivative work and notably consists of :

“the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,
[...]

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,
[...]

and to authorize any such acts.”

[46] What is more, Bestmont has a registered copyright for these works, which in of its own provides a presumption that Bestmont is the owner of the copyrighted works. The architectural works of Bestmont Hotels in the form of building designs and have been reproduced in the form of a photographs, on paper. Therefore, the Respondent exercises its rights under Section 3(1) of the Copyright Act³³.

C. If there is infringement, Bestmont should not pay an excessive amount of damages

(a) **The statutory damages awarded by the Trial Judge should be set aside in accordance with section 38.1 of the Act**

[47] Although it is evident from the foregoing arguments that Bestmont has not in any way violated Ms. Rer’s rights in the Façade Project, should this Honourable Court rule otherwise, Bestmont respectfully submits that the damages awarded by the Trial Judge are excessive and should be set aside.

³³ *Supra* note 21, at para. 49.

[48] The Courts may award statutory damages in accordance with section 38.1 of the *Act* to ease the evidentiary burden of copyright owners. However, as mentioned in *Bell Canada v. L3D Distributing Inc. (INL3D)* (“**Bell Canada**”)³⁴, to award a just result, it involves a case-by-case analysis of all the relevant facts³⁵ which are: the good or bad faith of the defendant, the conduct of the parties, the ignorance of the Court process and the need to deter future infringements of the copyright. In this case, should the Court rule in favour of Ms. Rer, statutory damages at the high end of the scale for commercial use should not be awarded based on five key elements.

(i) The good faith of Bestmont

[49] In this case, the Trial Judge erred in concluding that Bestmont was in bad faith as its actions clearly prove otherwise. Bestmont has registered copyright on its hotel’s architecture. Its actions are based on this appropriate belief of exclusivity to reproduce in any type of medium its marquees and hotel design. Bestmont’s refusal to accept a license for the right to use its own copyrights and its request to have Ms Rer destroy the existing copies of her Façade Project are well founded. These are not actions of a party acting in bad faith which would equate awarding damages at the higher end of the scale.

[50] For instance, the Appellant’s reliance on the reproduction case of the Work “Spirit of Our Land” in *Collett v. Northland Art Company Canada Inc (“Collet”)*³⁶ is misplaced. Contrary to Bestmont, the defendant did not have any underlying copyright protection of the print. Nor did the parties have the same relationship. On the one hand, in *Collet*, the past business relationship with the plaintiff clearly showed that the defendant acknowledged the plaintiff’s valid copyright on its work but still decided to reproduce the plaintiff’s photographs in addition to which it also changed

³⁴ *Bell Canada v. L3D Distributing Inc. (INL3D)*, 2021 FC 832, at para. 96.

³⁵ *Supra* note 1, s 38.1(5)

³⁶ *Collett v. Northland Art Company Canada Inc*, 2018 FC 269, at para. 10, 33-35.

the signatures for fifty prints. On the other hand, Bestmont never acknowledged that Ms. Rer has any copyrights in her Original and Filtered Works. Rather, Bestmont informed her of its copyrights in its marquee and hotel designs and asked her to destroy the photographs as they are an unauthorized reproduction.

(ii) *Bestmont's appropriate conduct prior to the proceeding*

[51] The caselaw provides that the conduct of a party before and during the proceedings will also have an impact on the nominal amount granted in statutory damages by the Courts. In *Bell Canada*, a higher amount was warranted given the defendant lack of participation in the proceedings.³⁷ However, this is not the case herein.

[52] Bestmont has a renowned reputation as a high-end luxury hotel and is known for providing curated experiences to its guests. Bestmont clearly advised Ms. Rer of its rights when refusing her licence proposal which is it had ultimately asked her to destroy any unauthorized reproductions. There was no malice nor abuse of power in such a request. In fact, it is those same actions that explains Bestmont's refusal to return Ms. Rer's portable drive. What is more, when Bestmont became aware of the imminent possibility that Ms. Rer was instituting proceedings for copyright infringement, Bestmont did not hesitate to remove the photographs from its hallways pending adjudication on the matter. Hence, at the same time limiting any alleged infringement of Ms. Rer's rights.

(iii) *The Original Works should be awarded as a whole*

[53] The Appeal Judge correctly concluded that Bestmont should not pay for fifty (50) separate pieces of work. Not only do the additional forty (40) Filtered Works lack originality to receive

³⁷ *Supra* note 34, para. 92.

copyright, but the other ten (10) Original Works, should they be found to be original, are to be assessed as part of a collection.

[54] The Appellant makes an analogy to *Bell Canada*, where each show's episode was treated as an individual work. However, this precedent should not be applied in the current situation. In the shows cited in Annex "B" of the *Bell Canada* decision, such as *Game of Thrones*, the original works offer tells a visual story that is expressed through entirely different angles, dialogues and actions³⁸. While in the present matter, the pictures taken by Ms. Rer are merely different renditions of the same idea through the mechanical application of the same concept, at the same angle and distance. Therefore, Ms. Rer's Façade Project photographs should not be analyzed separately but as a whole such that damages should be assessed based on one unauthorized reproduction of a Work rather than each photograph being assessed individually.

(iv) Bestmont's reproduction of Ms. Rer's Original Works was not for commercial use

[55] Section 38.1(1)(b) of the *Act* foresees considerably lower damages for the use of copyrighted work for a non-commercial purposes, like in this case.

[56] Bestmont having already built a strong reputation for high-end hotels with its carefully designed exterior and curated experience with the red marquee being already recognizable by most Canadians, like Ms. Rer, hanging artwork in the hallways of the guest floors does not in any way add any commercial value.

[57] In *Mejia v LaSalle College International Vancouver Inc.*³⁹, the photograph in question was visible in a very public and readily available medium, a company's Facebook page which explains how such use could be considered to have a commercial purpose. In contrast, Bestmont's use of the reproduced Original Works was limited in time and geographical scope: its guests' hallways.

³⁸ *supra* note 34, at para 57 at Annex "B".

³⁹ *Mejia v LaSalle College International Vancouver Inc.*, 2014 BCSC 1559, at para. 177-178.

In fact, these photographs were out of sight of the potential customers as only guests having already booked a room would be able to see them. The mere presence of the pictures in the hallways did not attract guests or add to Bestmont's reputation.

[58] Moreover, just like in *Constellation Brands U.S. Operations Inc. c. Société de vin internationale ltée*⁴⁰ where promotional leaflets were considered not to have a sufficient causal link between them and S.V.I.'s revenues from the sales of Apollo wine, these reproduced Original Works had an insignificant role in Bestmont's sales. The Façade Project was not even in its marketing materials.

[59] Therefore, if statutory were to be awarded, section 38.1(1)(b) of the *Act* applies and not the overly excessive amount of \$1,000,000 granted by the Trial Judge nor the \$15,000 by the Appeal Judge. Following the previous arguments, namely the good faith of Bestmont and its conduct before and during the proceedings, the award of statutory damages needs to be even lower than the Court of Appeal issued. Although Bestmont still strongly refutes the allegations of infringement, it submits that a reasonable amount for this case is \$1000 if the Original Works are assessed as a whole and \$100 if individually evaluated per section 38.1(3) of the *Act*.

(b) Punitive damages should not be awarded

[60] The Trial Judge erred in law when granting Ms. Rer punitive damages, especially one of such a large magnitude⁴¹.

[61] Section 38.1(7) of the *Act* states that a copyright owner may receive punitive damages in addition to statutory damages. However, in *Whiten v Pilot Insurance Co*⁴², it is specified that punitive damages are only an exceptional remedy and should only be awarded when it is clear that

⁴⁰ *Constellation Brands U.S. Operations Inc. c. Société de vin internationale ltée*, 2021 QCCA 1664, at para. 55, 58.

⁴¹ *Rallysport Direct L.L.C. v. 2424508 Ontario Ltd*, 2020 FC 1115, at para. 8-9.

⁴² *Whiten v Pilot Insurance Co*, 2002 SCC 18, at para. 36.

a party's conduct has been "malicious, oppressive or high-handed" and that offends the court's sense of decency."⁴³ Therefore, the award is only issued when misconduct represents a marked departure from the ordinary standards of decent behaviour.

[62] The objective of punitive damages is not compensating the plaintiff for the loss of profits but rather to punish a party's conduct and deter them from behaving in such a way in the future.

(i) *Bestmont's conduct was not malicious nor in bad faith*

[63] Bestmont's actions before and during the proceedings were based solely on a reasonable belief of exclusivity to reproduce its marquees and hotel design in any format. But even then, it listened to her license proposal and voluntarily took the photographs down from its hallways pending adjudication.

[64] Its actions are not actions of a party acting in accordance with the factors established in *Whiten*. It did not in any circumstance act in a malicious way since it did not hurt nor harm Ms. Rer's feelings caused by a feeling of hate, not considered its opinions nor mistreated her.⁴⁴

(ii) *Ms. Rer did not plead punitive damages as a separate basis of relief*

[65] As correctly alluded to by the Appeal Judge, Ms. Rer did not even plead punitive damages as a separate basis of relief. Punitive damages is an equitable remedy that cannot be granted by the Court of its own discretion. Punitive damages must be pleaded. As such, Ms. Rer's failure to plead punitive should in of itself be sufficient to set aside the Trial Judge award of \$500,000 of punitive damage.

Moreover, Bestmont acknowledges that the trial judge has the discretion to award a higher or lower amount based on various factors established in the case law. While in a way this may

⁴³ *Hill v Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196.

⁴⁴ *Oxford English Dictionary*, online edition, "malicious", "oppressive", "high-handed" [*OED*]

serve the same purpose, statutory damages are not intended to be punitive. Moreover, this discretion does not allow the Court to grant an amount that is greater than what is permitted by the *Act*. It simply allows the Court to determine whether an award of statutory damages closer to the maximum amount permitted by the *Act* is justified.

[66] Incidentally, these factors are the same as those discussed above:

- Whether the conduct was planned and deliberate;
- The intent and motive of the defendant;
- Whether the defendant persisted in the outrageous conduct over a lengthy period of time;
- Whether the defendant concealed or attempted to cover up its misconduct;
- The defendant's awareness that what he or she was doing was wrong; and
- Whether the defendant profited from its misconduct.⁴⁵

[67] And as it was previously established, Bestmont's actions do not satisfy the criteria the requirements for a higher award of damages: Bestmont acted in good faith, without malice, did not attempt to conceal its actions and in no way profited from those actions. Consequently, not only as the Trial Judge erred in awarding Ms. Rer punitive damages but the facts of the case are not conducive to the use of its discretionary power.

PART V – ORDER REQUESTED

[68] Therefore, the Respondent respectfully requests that this appeal be dismissed.

THE WHOLE RESPECTFULLY SUBMITTED this 28th day of January 2022.

TEAM 4R

Counsel for the Respondent

⁴⁵ *Supra* note 36 at para. 72.

PART VI – TABLE OF THE AUTHORITIES

AUTHORITY	Pinpoint
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LEGISLATION	
<i>Copyright Act</i> , RSC 1985, c C-42.	ss 2, 3, 5(1), 27, 32.2(1)(b), 38.1

JURISPRUDENCE	
<i>Ateliers Tango Argentin Inc. v Festival d'Espagne & d'Amérique Latine Inc.</i> , [1997] R.J.Q. 3030.	39
<i>Bell Canada v L3D Distributing Inc. (INL3D)</i> , 2021 FC 832.	57, 92, 96
<i>Bestmont v Rer</i> , 2021 CAIP 333.	3-5, 8-9
<i>Canadian Admiral Corp. v Rediffusion, Inc.</i> , 20 C.P.R. 75.	p. 405
<i>CCH Canadian Ltd v Law Society of Upper Canada</i>	13, 15-16. 35
<i>Collett v Northland Art Company Canada Inc.</i> , 2018 FC 269.	10, 33-36
<i>Constellation Brands U.S. Operations Inc. c. Société de vin internationale ltée</i> , 2021 QCCA 1664.	55, 58
<i>Drouin (Succession de Çté-Drouin) v. Pepin</i> 2019 QCCS 848.	178

<i>Édutile Inc. v Automobile Protection Assn.</i> , [2000] 4 F.C. 195 (C.A.).	22
<i>Goldi Productions Ltd. v. Bunch</i> , Court File No.: 15-5800, dated August 1, 2018	15-16
<i>Hill v Church of Scientology of Toronto</i> , [1995] 2 S.C.R. 1130.	196
<i>Mejia v LaSalle College International Vancouver Inc.</i> , 2014 BCSC 1559.	177-178
<i>Michelin - Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada)</i> , [1996] F.C.J. No. 1685.	64
<i>Portraits Rembrandt ltée v. Interdonato (Ikono)</i> 2019 QCCQ 5878.	25-29
<i>Rallysport Direct L.L.C. v. 2424508 Ontario Ltd</i> , 2020 FC 1115	8-9
<i>Rer v Bestmont Hotels</i> , 21 TCCIP 1222.	1-8, 16, 19-21, 26
<i>Robertson v Thomson Corp.</i> , 2006 SCC 43.	81
<i>Théberge v Galerie d'Art du Petit Champlain Inc.</i> 2002 SCC 34	32, 42, 49
<i>Whiten v Pilot Insurance Co</i> , 2002 SCC 18.	36

SECONDARY MATERIALS	
Adobe Creative Cloud Express, “How to add a filter to your photo, online: < https://www.adobe.com/express/feature/image/filter >.	

CÔTÉ (Pierre-André), <i>The Interpretation of Legislation in Canada</i> , 4th ed. (Toronto: Carswell, 2011).	p. 535-536
<i>Oxford English Dictionary</i> , online edition.	“reproduction”, “malicious”, “oppressive”, “high-handed”

OTHER MATERIALS	
<i>Factum of the Appellant, Team 10A.</i>	57, 62