

**SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS**

BETWEEN:

**WANDA RER**

Appellant

— and —

**BESTMONT HOTELS**

Respondent

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**FACTUM OF THE APPELLANT**

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## PART I: Overview

[1] This case concerns the protection of artists from wealthy conglomerates that seek to exploit self-employed Canadians to cut the costs of a licensing fee. In protecting original and filtered photos, this case encourages the court to foster artistic creation in the digital age of editing software and social media.

[2] The Appellant, Ms. Wanda Rer (“Ms. Rer”), respectfully requests that this Honourable Court overturn the Court of Appeal (“COA”) decision, which held that copyright did not subsist in the Appellant’s photographs and that the Respondent, Bestmont Hotels (“Bestmont”) did not infringe the Appellant’s copyright.

[4] Ms. Rer’s Original Photos include ten photos of each Bestmont hotel in Canada. These Photos feature Bestmont’s renown entrance design and red marquee to compare and contrast the differences amongst the hotels. Ms. Rer exercised skill and judgement to create these photos and subsequently apply filters to create the Filtered Photos.

[5] The court should uphold the Trial Court’s finding that *both* the Original and Filtered Photos are original works per s. 5(1) of the *Copyright Act* (hereafter referred to as “the *Act*”) and therefore copyright subsists in these photos. Even if Bestmont attempts to claim copyright in the Original Photos, they are exempted in s. 32.3(1)(b)(ii) as photographs of architectural works.

[6] Bestmont’s actions in bad faith and deliberate copying of Ms. Rer’s Original Photos and Filtered Photos warrants the maximum statutory damages. Punitive damages were rightfully awarded to Ms. Rer as these damages serve to deter future infringements from Bestmont, a party that utilized fifty copies of Ms. Rer’s work, yet denied her a licensing fee and any attribution.

## PART II: Statement of Facts

### The Creation of Ms. Rer's Photo Project

[7] Ms. Rer, is a Canadian artist, photographer and social media influencer (*Trial*). For nearly a decade, Ms. Rer has gained extensive industry knowledge in photography through her travels (*Trial*). Ms. Rer combines her marketing skills and creative talents to produce photo collections portraying lifestyle and culture on her social media accounts (*Trial*). These photos have earned her a substantial social media following and fan base (*Trial*).

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

[8] The Respondent, Bestmont, is a high-end Canadian hotel chain with ten locations in Canada (*Trial*). Each Bestmont Hotel is carefully designed and styled to provide guests with an authentic, luxury experience attracting many tourists (*Trial*). Bestmont's hotels are well-known by Canadians for the unique designs and the red marquee (hereafter referred to as "design/marquee") that decorates the hotels' entrance (*Trial*). Ms. Rer was motivated by the beauty of the Bestmont hotels, which she set out to express and capture through a photo project called "Façades" (*Trial*). The project consists of photographs of each hotel's entrance so that an observer of the collection can compare and contrast the hotels' design and atmosphere (*Trial*).

*Trial, supra* para 7 at paras 2-3.

[9] Relying on her photography expertise, Ms. Rer captured photos directly in front of each of the ten hotels at a distance of 100 feet (*Trial*). This distance was specifically chosen to allow the marquee to be prominently featured, while still depicting the unique design features and atmosphere of each Bestmont hotel façade. Ms. Rer testified that the same technique and camera setup was used for each hotel to produce comparable images (*Trial*). These ten images are

hereafter referred to as the “Original Photos.” Drawing on her editing skills, Ms. Rer selected and applied the filters ‘sepia’, ‘oil painting’, ‘pixilation’ and ‘pencil drawing’ to the Original Photos using a social media platform (*Trial*). Ms. Rer utilized these filters to attract more views as they are artistic tools that enhance the Original Photos’ appeal and because of its popularity on social media (*Trial*). These forty filtered images are hereafter referred to as the “Filtered Photos.”

*Trial, supra* para 7 at paras 4-5.

### **Bestmont’s Unauthorized Copying of Ms. Rer’s Photographs**

[10] Ms. Rer approached Bestmont, proposing to license her Original and/or Filtered Photos to Bestmont to use as marketing materials, at a rate of \$3,000 per image (*Trial*). Ms. Rer provided Bestmont with high resolution electronic copies of the fifty images, including the Original and four Filtered Photos of each Bestmont hotel (*Trial*). Ms. Rer advised that she would consult with Bestmont and select and apply different filters to tailor the photographs if a different marketing ‘feel’ was desired (*Trial*). In response, Bestmont rejected Ms. Rer’s proposal and instead accused her of infringing Bestmont’s copyright in its design/marquee (*Trial*). Despite Ms. Rer’s repeated requests, Bestmont refused to return Ms. Rer’s package containing her Photos (*Trial*).

*Trial, supra* para 7 at paras 6-7.

[11] Subsequently, Bestmont held onto the copies of the Filtered Photos and thus was aware of what the photos look like with the ‘sepia’, ‘oil painting’, ‘pixilation’ and ‘pencil drawing’ filters (*Trial*). Bestmont used a different photo editing software and took the electronic version of each Original Photo and applied eleven filters, four of which include the aforementioned filters, to create a dozen copies of each Original Photo, thus creating its own ‘Façade’ collection (*Trial*).

Bestmont printed and framed the twelve Bestmont Façade Photos and used them to decorate the hallways of its hotels. At no time did Bestmont attribute or credit the Photos to Ms. Rer (*Trial*).

*Trial, supra* para 7 at para 8.

[12] Upon learning of Bestmont's activities, Ms. Rer reached out to Bestmont and demanded her photographs be removed from the hallways, Bestmont chose not to respond (*Trial*). After repeated attempts to contact Bestmont, Ms. Rer commenced a claim alleging copyright infringement, seeking a permanent injunction and sought the highest statutory damages allowable pursuant to s. 38.1 (*Trial*). Bestmont defended against Ms. Rer's claim by denying that there was copyright in the Façade photos and, in the alternative, that Bestmont is permitted to reproduce its own copyright in the design/marquee (*Trial*). Before trial, Bestmont removed the allegedly infringing Façade photos from its hallways. The requested injunction is moot.

*Trial, supra* para 7 at paras 9-10.

### **The Trial Court Proceedings**

[13] The Trial Judge found in Ms. Rer's favour and held that copyright subsists in all of the Original and Filtered Photos because Ms. Rer exercised the necessary skill and judgment (*Trial*). The Trial Judge also concluded Ms. Rer could author the photos without infringement of Bestmont's copyright in the design/marquee, as photography of buildings is statutorily permitted by s. 32.2(1)(b) of the *Act* (*Trial*).

*Trial, supra* para 7 at paras 16, 18.

[14] The Trial Judge found Bestmont's right to reproduce its copyright in the design/marquee in any material form under s. 3 of the *Act*, did not allow Bestmont to reproduce the Original and Filtered Photos (*Trial*). The Trial Judge found Bestmont to have infringed Ms. Rer's copyright in

her Photos (*Trial*). The Trial Judge found the infringement to be for commercial purpose, granting \$1,000,000 in statutory damages and \$500,000 in punitive damages (*Trial*).

*Trial, supra* para 7 at paras 18-20.

### **The Court of Appeal (“COA”) Proceedings**

[15] The COA allowed the appeal and dismissed the action of the Trial Judge (*Appeal*). The COA found that, as the owner of the underlying copyright in the design/marquee, Bestmont’s right to reproduce its copyright in any material form allows Bestmont to reproduce Ms. Rer’s Original Photos (*Appeal*). The COA interpreted that s. 32.2(1)(b) applies solely as a defence to infringement and does not confer any right to assert copyright and thus found Bestmont to be immune from Ms. Rer’s infringement allegations (*Appeal*).

*Bestmont v Wanda Rer*, 2021 CAIP 333 at paras 1-2 [*Appeal*].

[16] The COA concluded that the Trial Judge’s threshold for establishing originality was too low (*Appeal*). The COA found that Ms. Rer’s photography techniques did not create original works and therefore the Original Photos did not have copyright (*Appeal*). The COA also found that applying filters did not warrant copyright protection for the Filtered Photos (*Appeal*).

*Appeal, supra* para 15 at paras 5, 8.

[17] The COA found the damages awarded by the Trial Judge to be grossly out of proportion (*Appeal*). The COA’s position was that Bestmont did not act in bad faith and that the Trial Judge had no discretion to award punitive damages (*Appeal*). The COA further concluded that the Trial Judge should have applied s. 38.1(3) to reduce the damages award to no more than \$15,000 if infringement was found (*Appeal*).

*Appeal, supra* para 15 at para 8.

### **PART III: Points in Issue**

[18] This appeal raises three issues:

1. Whether the COA erred in finding that copyright does not subsist in Ms. Rer's Original and Filtered photos under subsection 5(1) of the *Act*.
2. Whether the COA erred in its interpretation and application of ss. 3 and 32.2(1)(b) of the *Act* to find that Ms. Rer infringed Bestmont's underlying copyright.
3. Whether the COA erred in finding that Ms. Rer was entitled to neither statutory nor punitive damages.

#### **PART IV: Arguments in Brief**

### **1. The COA erred in finding that copyright does not subsist in Ms. Rer's Original and Filtered Photos under s. 5(1) of the *Act*.**

#### **A. The COA erred in applying the originality test to the Original Photos.**

[19] Photos are an original work warranting copyright under s. 5(1) of the *Act*. Each of the Original Photos are original works per the statutory definition as they satisfy the test for originality derived in *CCH Canadian Ltd v. Law Society of Upper Canada*. In *CCH*, the Supreme Court outlined the following test for originality:

For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean 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.

*Copyright Act*, RSC 1985, c C-42, s 5(1) [The *Act*].  
2004 SCC 13 at para 16 [*CCH*].

[20] The COA misapplied the originality test to the photographic technique and was incorrect in assessing the originality of the Original Photos, the Façades photos and the Filtered Photos

(“Ms. Rer’s collections”). Copyright subsists in Ms. Rer’s photographs. The Trial Judge’s decision should be reinstated to find that Ms. Rer’s copyright was infringed by Bestmont per s. 27 of the *Act* when Bestmont reproduced the Original and Filtered Photos’ without authorization and for a commercial purpose.

*The Act, supra* para 19, s 27.

***(i) The COA erred in finding that copyright would only subsist in the collection of photographs.***

[21] First, Copyright subsists in both the ten individual Original photos and the collection titled Façades photographs. Second, the COA erred in attributing the Façades photographs’ originality to Bestmont. Third, the COA erred in reasoning that the Trial Judge’s test for originality was “too low” (*Appeal*).

*Appeal, supra* para 15 at para 5.

[22] The COA erred in finding that originality vests only in the collection of Façades photographs. Each of Ms. Rer’s Original Photos go beyond purely mechanical skill. and possess originality (*Appeal*). In *Goldi Productions Ltd v. Bunch*, the court provided an example of what constitutes “purely mechanical skill” in photography that does not attract copyright protection. The Court held that Mr. Goldi exercised ‘purely’ mechanical skill in photography as Mr. Goldi sourced the photos from other parties, then took a photograph of these photos. Mr. Goldi then inputted the photos into a computer program to enhance the photos’ quality (*Goldi*).

*Appeal, supra* para 15 at para 5.

(1 August 2018), Brampton 15/5800 (Ont Sup Ct J) at para 15 [*Goldi*].

[23] Ms. Rer’s actions are distinguishable from *Goldi* as Ms. Rer captured the Original Photos herself and the photos were a product of her own idea brought into the form of a



physical photo. This expression goes beyond the purely mechanical skill of photographing an existing photo in *Goldi*.

*Goldi, supra* para 22.

[24] Ms. Rer exercised skill in creating each Original Photo that meets the test of originality for copyright protection. The COA thus erred in finding that the repetition of Ms. Rer’s concept and technique does not warrant copyright for each photo. Rather, Ms. Rer needed to repeat this technique to realize her idea of capturing the differences of each Bestmont hotel façade. Therefore, each of Ms. Rer’s Original Photos express an idea, which meets the definition of an original work (*CCH*) as it required the exercise of her photography skills that went well beyond the “purely mechanical” exercise of taking photos (*Goldi*).

*Appeal, supra* para 15 at para 5.

*CCH, supra* para 19 at para 16.

*Goldi, supra* para 22 at para 15.

[25] Ms. Rer exercised judgement in creating the Original Photos. A photographer applies judgement by selecting various options for taking the photo, taking into account variables applied in *Trader Corp v. CarGurus Inc*, such as subject matter, angles, staging and framing. Trader’s photographers took over 100,000 pictures using the same standardized method, and the photos were then uploaded to Trader’s digital marketplace (*Trader*). The court found that following a standardized procedure did not eliminate the photographers’ skill and judgement, nor did it render the creation of the photos a purely mechanical exercise (*Trader*). If a photographer’s work is original even when said photographer follows a prescribed procedure, then Ms. Rer’s work must be found original as well.

2017 ONSC 1841 at paras 3-4, 23 [*Trader*].

[26] Ms. Rer is familiar with social media influencing and how photos gain popularity on these platforms. She has this developed experience that demonstrates an exercise of skill in taking the Original Photos. Ms. Rer decided to take the photo at a distance of 100 feet, featuring the marquee and façade. The evaluation of options such as framing and subject matter constitute an exercise of judgement required to create Ms. Rer's Original Photos. To deny originality in Ms. Rer's Original Photos because the photos center the design/marquee negates the necessary elements of skill and judgement exercised in Ms. Rer's photography.

[27] Since the photos required Ms. Rer to exercise both skill and judgement, the Appellant submits that the COA erred in attributing originality of Ms. Rer's Original photos to Bestmont and the Façades collection. The ten Original Photos have each attracted copyright protection as defined by the *Act* and the court in *CCH*.

***(ii) The Trial Judge's analysis met the test for originality.***

[28] The COA's conclusion that the Trial Judge's test for originality was "too low" does not comply with the *Act's* intention and subsequent interpretations of s 5(1) (*Appeal*). If courts were to move forward with requiring artists to meet a sufficient quantity of skill and judgement to justify copyright protection, the test for originality becomes a value-laden judgement which is counterproductive to copyright's purpose in Canada (*CCH*). The COA's conclusion should therefore be reversed to find in favour of Ms. Rer, in order to be aligned with copyright law's policy objectives of balancing the rights between protecting creators and society at large.

*Appeal, supra* para 15 at para 5.  
*CCH, supra* para 19 at para 23.

[29] The COA attempted to impose its own threshold for originality that is inconsistent with the SCC's definition of originality as non-trivial, non-mechanical efforts involving skill and

judgement (*CCH*). The Canadian standard established in *CCH* emphasizes the creative nature of artistic works and not the time spent labouring on the work (Gervais). The COA incorrectly described a quantifiable amount of originality to the Original Photos as “too low” and quantified the originality of the Filtered Photos as an “infinitesimal amount” (*Appeal*). The COA derived its own quantifications of originality, contrary to the SCC test for originality, to classify Ms. Rer’s copyright as not justifying “broad protection” (*Appeal*).

*CCH, supra* para 19 at para 16.

Daniel J Gervais, “Canadian Copyright Law Post-CCH” (2004/2005) 18 IPJ 131 at 142.

*Appeal, supra* para 15 at para 5.

**B. The COA erred in denying originality on the basis that the Original and Filtered Photos were mechanistic in nature.**

[30] The COA erred in finding that the Original and Filtered Photos were not original due to a “mechanistic process” (*Appeal*). The COA defined mechanistic as “mechanically repeating the same concept” (*Appeal*) when referring to Ms. Rer’s Original Photos, conflating the term ‘mechanical’ with ‘repetitive’ to deny Ms. Rer’s copyright. This interpretation is not consistent with the plain text of the *Act*, which states that copyright subsists in every “original work.”

*Appeal, supra* para 15 at para 5.

The *Act, supra* para 19, s 5(1).

[31] Even if the process to derive the photos was mechanistic, an original work need not be “novel” in its creation (*CCH*). As such, a repetitive process can generate an original result. The Trial Judge was therefore correct in finding originality in both the Original and Filtered Photos.

*CCH, supra* para 19 at para 16.

[32] Ms. Rer’s copyright in the Filtered Photos cannot be deprived because the COA reasoned that filtering is a mechanistic process. If the COA’s interpretation of filtering photos is upheld, copyright protection is arguably no longer available to works created using technology that

allows application of stylistic features. Simply because a software tool is used must not deprive the author who wields that tool from claiming copyright protection in the resulting work.

[33] The COA's conclusion that applying a filter does not warrant copyright counters the principle of technological neutrality upheld by Canadian courts (*CBC*). Under technological neutrality, there is no justification for courts to distinguish an activity that is accomplished through different technical means (*Rogers*). The filters are an artistic tool that creates the Filtered Photos, yet the COA is incorrectly comparing the filters' artistic function to a mechanical process. The COA erroneously focused on *how* the filtering software performed artistic effects on the photographs, instead of correctly asking *what function* the software was performing (*CBC* citing *ESA*). Applying filters enhanced the aesthetic appeal of Ms. Rer's Filtered Photos as these filters are popular on social media.

*Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57 [*CBC*] at para 181 citing *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 [*ESA*] at paras 5, 9-10.  
*Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para 29 [*Rogers*].

[34] The COA's finding that the Filtered Photos are not original must be overturned to prevent the COA's policy preference that technological software used to create artistic photos do not warrant copyright protection. The *Act* does not give judges license to substitute their policy preferences (*Euro*). Copyright law is a "creature of statute" and is not subject to the Court's interpretation that deviates from the *Act*'s express language regarding original works (*CCH*).

*Kraft Canada Inc v Euro Excellence Inc*, 2007 SCC 37 at para 3 [*Euro*].  
*CCH*, *supra* para 19 at para 9.

**2. The COA erred in its interpretation and application of ss. 3 and 32.2 of the *Act* to find Ms. Rer infringed on Bestmont's underlying copyright.**

**A. The *Act* contains provisions that specifically prescribe copyright protection for photographs of architectural works.**

[35] Bestmont rightfully holds copyright in the underlying design/marquee (Appeal). However, the *Act* contains language and provisions that differentiate photographs from architectural works and specifically prescribe copyright protection for photographs of architectural works. Beginning with s. 2, architectural works and artistic works are defined separately. In its definition of artistic works, photographs and architectural works are presented as separate examples (*Act*). Therefore, the Court should undertake a separate analysis of both Ms. Rer's copyright in the Photos and Bestmont's copyright in the design/marquee, instead of denying Ms. Rer's originality due to the presence of the design/marquee in the Photo.

*Appeal, supra* para 15 at para 2.  
*The Act, supra* para 19, s 2.

[36] The Court's refusal of Ms. Rer's copyright in the Photos does not comply with Parliament's intention of Bill C-11 *Amending the Act* in stimulating artistic innovation and economic growth and allowing copyright to subsist in photographs of architectural works (*Bill; Debate*). In reading the plain language of the legislation, the COA erred in finding that Ms. Rer infringed Bestmont's copyright. Instead, finding copyright in Ms. Rer's work is in favour of Parliament's intention to differentiate works of photography and "harmonize the treatment of photographers under Canada's copyright law with that of other creators (*Debate*)."

Bill C-11, *An Act to amend the Copyright Act*, 1st Sess, 41st Leg, Federal, 2012 (assented to 29 June 2012).  
Gordon Brown, "Bill C-11, An Act to amend the Copyright Act" (Legislative Debate held at the House of Commons, Ottawa, February 8 2012), Vol 146 Hansard 76 [*Debate*].

[37] S. 32.2 of the *Act* recognizes that separate copyright protection in a photo can arise even if some contents of the photo are copyright-protected work (*Act*). In the specific context of photos of public buildings, there is also an express safe harbour created under s. 32.2(1)(b)(i) for photographers to take photographs of buildings without attracting liability for infringement (*Act*).

The *Act*, *supra* para 19, s 32.2.

[38] S. 32.2.(1)(b)(ii) further reinforces that it is not an infringement of copyright for any person to reproduce in a photograph of a sculpture or work of artistic craftsmanship that is *permanently situated in a public place or building (Act)*. The hotel entrance which includes the design/marquee is an example of a public place that is viewable and accessible to the public. Ms. Rer took the Original Photos on a public street, 100 feet away, qualifying the Original Photos for the s. 32.1.2(1)(b)(ii) infringement exception (*Trial*).

The *Act*, *supra* para 19, s 32.2.1(b)(ii).  
*Trial*, *supra* para 7 at para 4.

**B. The COA erred in its interpretation of the *Act* to find that Bestmont had an exclusive right to directly copy Ms. Rer’s Original Photos.**

[39] The COA erred in its interpretation and application of s. 3 to find that the exclusive right of a copyright owner to reproduce its architectural works “in any material form” extends to making direct copies of Ms. Rer’s Original Photos (*Appeal*). S. 3(1) of the *Act* grants the owner of copyright the exclusive right to make certain types of works. However, photographs are explicitly excluded from s. 3(1). Thus, while Bestmont has the underlying copyright in the design/marquee, s. 3 does not grant Bestmont the exclusive right to reproduce photos of the design/marquee. As a result, Bestmont’s copies of Ms. Rer’s Photos do attract copyright liability.

*Appeal*, *supra* para 15 at para 2.  
The *Act*, *supra* para 19, s 3(1).

[40] The COA appropriately interpreted Ms. Rer’s Photos and the design/marquee as separate works, noting that originality exists in both works by dividing originality into parcels, one for the hotel (“bulk of”) and one for Ms. Rer (*Appeal*). However, the COA erred in concluding that no copyright ultimately subsists for Ms. Rer because s. 32.2 only serves as a defence and cannot be

used to assert copyright against others (*Appeal*). There is no language in s. 32.2(1)(b) or in the entirety of the *Act* that suggests restricting any party from their statutory right to establish copyright if exempted under this provision. Therefore, Ms. Rer has copyright in her Original Photos as part of the exemption in 32.2(1)(b) exemption, and that extends to directly copying and using the Original Photos.

*Appeal*, supra para 15 at para 3-5.  
The *Act*, supra para 19, s 32.2(1)(b).

[41] The COA gave a preferential assessment of originality, favouring architectural works over photography. Parliament specifically intended through Bill C-11 that photographs warrant its own copyright protection (*Debate*). Member of Parliament Gordon Brown noted the intention of Bill C-11 “would make photographers the first owners of the copyright of their photographs” (*Debate*). The COA failed to treat photographers under Canada's copyright law with the same consideration of other creators (*Debate*). This error should be reversed to find that Ms. Rer has copyright of her Original Photos and should be protected from infringement.

*Debate*, supra para 36.

[42] The court in *Hay v. Sloan* and subsequent jurisprudence continues to hold that copyright of architectural works and any infringement thereof subsists in the designs that give rise to the building (*Hay; GMBH*). Furthermore, s. 32.2 makes specific mention that only photographs that are not in the nature of an architectural drawing or plan, are covered under the infringement exception (*Act*). The specific language of the *Act* differentiates photographs and architectural works from one another in these provisions, while also emphasizing that it is the designs that require copyright protection. There exists no jurisprudence that supports the COA’s finding that a photograph of an architectural work is an infringement of said architectural work.

*Hay v Sloan*, 1957 SCO 27 at para 7 [*Hay*].

*Corocord Raumnetz GMBH v Dynamo Industries Inc*, 2016 FC 1369 at para 85(4) [*GMBH*].  
The *Act*, *supra* para 19, s 32.2.

[43] The court must reverse the COA's decision and find that Bestmont does not have exclusive rights to copy Ms. Rer's Original Photos under s. 3. Given that Bestmont does not have exclusive rights to the Original Photos, the court must find that Bestmont infringed on Ms. Rer's Original Photos through the unauthorized reproduction of these photos. To apply such an over-encompassing application of s. 3 when provisions such as s. 32.2 are available, and when the language of the *Act* suggests otherwise, is restrictive rather than balancing and does not comply with Parliament's intention (*Debate*).

*Debate*, *supra* 36.

### **3. The COA erred in reversing the statutory and punitive damages awarded at Trial.**

#### **A. The COA erred in finding Ms. Rer was not entitled to statutory damages.**

[44] Bestmont's infringements were for a commercial purpose, and as such, the Court has discretion to grant awards under s 38.1(1) (*Act*) within the range of \$500 to \$20,000. The COA incorrectly dismissed Ms. Rer's damages award and misapplied the factors under s. 38.1 of the *Act* to suggest an award of \$15,000 if there was infringement (*Appeal*).

The *Act*, *supra* para 19, s 38.1(1).  
*Appeal*, *supra* para 15 at para 9.

#### ***(i) The Trial Judge was correct in finding that Bestmont infringed Ms. Rer's copyright for a commercial purpose.***

[45] Ms. Rer is entitled to the maximum award of statutory damages, \$20,000 per photo, as decided at Trial (*Trial*). Bestmont infringed Ms. Rer's copyright when it utilized Ms. Rer's ten Original Photos and applied four filters identical to Ms. Rer's Filtered Photos to each of the ten photos, totalling an infringement of fifty works (*Trial*).

*Trial*, *supra* para 7 at paras 19-20.



[46] Bestmont infringed Ms. Rer's copyright for a commercial purpose as per s. 38.1(1)(a) of the *Act* by displaying the Original Photos and Bestmont's Filtered Photos to decorate the hotels' hallways (*Trial*). Bestmont must create a luxurious atmosphere to maintain its reputation as a high-end hotel, decorations like Ms. Rer's Original Photos and photos similar to the Filtered Photos that make up the hotels' interior accomplish this atmosphere.

*Trial*, supra para 7 at para 8.

[47] Bestmont received free advertising for each of its ten locations through the Original Photos. Bestmont saved costs on advertising by copying Ms. Rer's Original Photos and applying the same filters instead of licensing a professional photographer to do so. These cost-saving benefits demonstrate that Bestmont infringed Ms. Rer's copyright for a commercial purpose.

***(ii) The Trial Judge correctly assessed statutory damages as \$20,000 per photo.***

[48] The Trial Court correctly granted Ms. Rer the maximum statutory damages of \$20,000 for each Original and Filtered Photo Bestmont copied and displayed in Bestmont's hallways. The COA did not adequately consider the factors in s. 38.1(5) when assessing statutory damages, including: (a) the 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 (*Act*).

The *Act*, supra para 19, ss 38.1(5)(a)-(c).

[49] Bestmont's actions constituted bad faith under s. 38.1(5)(a) (*Act*). The Federal Court identified defining factors for bad faith as repeatedly infringing different products and scraping or copying photos directly from a website (*Rallysport*). Bestmont acted in bad faith by using the electronic version of Ms. Rer's Original Photos and reproducing identical photos to Ms. Rer's Original Photos and Filtered Photos. In addition, Bestmont copied and displayed the photos in

its hotels for public viewing. This direct copying demonstrates Bestmont's bad faith that warrants greater statutory damages than the \$15,000 proposed at Appeal.

*The Act, supra* para 19, s 38.1(5)(a).  
*Rallysport Direct LLC v 2424508 Ontario Ltd*, 2020 FC 794 at para 10 [*Rallysport*].

[50] In assessing s. 38.1(5)(b) (*Act*), the COA did not address Bestmont's repeated and knowing disregard of Ms. Rer's copyright before the proceedings. Bestmont created copies and utilized Ms. Rer's work without consent or license. Further, Bestmont did not respond to Ms. Rer's multiple demands to take down the infringing photos. A defendant's lack of response can also be considered to find damages in favour of the plaintiff (*Bell*). These actions demonstrate conduct not in accordance with the law, thus, statutory damages are owed to the Appellant.

*The Act, supra* para 19, s 38.1(5)(b).  
*Bell Canada v L3D Distributing Inc*, 2021 FC 832 at para 103 [*Bell*].

[51] There is a pressing need to deter Bestmont from further infringing Ms. Rer's copyright per s. 38.1(5)(c) (*Act*). The maximum statutory damages awarded at Trial deter Bestmont from reproducing Ms. Rer's work, as Bestmont still possesses the electronic version of the Original Photos. Statutory damages are especially essential where future infringements can occur through technology (*Collett*). Bestmont can continue to copy Ms. Rer's Photos through photo editing software, so there is an urgent need to deter Bestmont from doing so in the future.

*The Act, supra* para 19, s 38.1(5)(c).  
*Collett v Northland Art Company Canada Inc*, 2018 FC 269 at para 63 [*Collett*].

[52] Courts have awarded maximum statutory damages to a photographer where a company intentionally reprinted photos without the photographer's authorization, and where the reproduction of unauthorized works was accomplished with the ease of technology (*Collett*). Bestmont also intentionally reproduced Ms. Rer's Original and Filtered Photos and can produce

several copies with photo editing software, providing similar grounds for an award of maximum statutory damages.

*Collett, supra* para 51 at paras 58-64.

[53] The Appellant is an artist protecting her work from Bestmont, a party with deep pockets that could have afforded Ms. Rer's licensing fee, yet proceeded to infringe her copyright. The maximum amount of statutory damages is thus warranted to have a commensurate deterring effect on Bestmont, a luxury hotel chain capable of infringing the Appellant's copyright fifty times. The court should reinstate the Trial Judge's award of statutory damages of \$1,000,000.

**B. The Trial Judge was correct in awarding Ms. Rer punitive damages of \$500,000.**

***(i) The COA erred in finding that the Trial Judge had no discretion to award punitive damages***

[54] Punitive damages are awarded under s. 38.1(7) (*Act*) when a party's conduct represents a "marked departure from ordinary standards of decent behaviour" (*Whiten*). In conjunction with s. 38.1(5), s. 38.1(7) allows the Court to increase an award of statutory damages where statutory damages are inadequate to accomplish the objectives of denunciation, retribution, and deterrence (*Whiten*). Bestmont's behaviour towards Ms. Rer and subsequent actions regarding the Original Photos demonstrate that the COA erred in dismissing the Appellant's punitive damages award.

The *Act, supra* para 19, s 38.1(7).  
*Whiten v Pilot Insurance Co*, 2002 SCC 18 at paras 36, 123 [*Whiten*].

[55] The Appellant offered Bestmont a license to the Original Photos and Filtered Photos (*Trial*). Factors such as profit motives and refusal to take steps to respond to demands can heighten a punitive damages award (*TFI*). Bestmont not only refused this licensing offer, but proceeded to accuse the Appellant of infringement and nonconsensually kept Ms. Rer's works

(*Trial*). Bestmont’s refusal to return the Original and Filtered Photos and Bestmont’s silence towards Ms. Rer’s demands demonstrate a marked departure from decent behaviour.

*Trial*, supra para 7 at paras 6-7.

*TFI Foods Ltd v Every Green International Inc*, 2021 FC 241 at para 74 [*TFI*].

[56] The COA had no reasonable grounds to reject punitive damages because the punitive damages awarded at Trial were “grossly” disproportionate (*Trial*). Courts have interpreted the *Act* as having no fixed ratio between punitive damages and compensatory damages (*TFI*). Punitive damages are awarded separately per s. 38.1(7) of the *Act* and are not determined relative to any statutory damages awarded.

*Appeal*, supra para 15 at para 8.

*TFI*, supra para 55 at para 70 citing *Lam v Chanel S de RL*, 2017 FCA 38 at para 12.

The *Act*, supra para 19.

[57] Bestmont deliberately retained the Original and Filtered Photos, which gave it the opportunity to reproduce ample copies of these Photos. Punitive damages are considered appropriate where the defendant’s misconduct was planned and deliberate (*TFI*). Bestmont’s misconduct must be denounced to protect artists from malicious disregard to their copyrighted works. Punitive damages serve this protective function and should be awarded.

*TFI*, supra para 55 at para 68.

***(ii) The COA erred in requiring a pleading to access punitive damages.***

[58] The COA failed to refer to any procedural requirement and therefore erred in denying the Trial Judge’s discretion to award punitive damages. In *Lubrizol Corp. v. Imperial Oil Ltd.*, the appellant was not required by *Federal Court Rules* to expressly plead damages in order for the Trial Judge to exercise their discretion to award exemplary damages. If a pleading is expressly required, the COA must reference the applicable rules which set out such a requirement.

[1996] 3 FC 40 at para 19, [1996] FCJ No 45.

[59] The Court erred in rejecting punitive damages because these damages were not expressly pleaded. The court must balance between ensuring defendants are not taken by surprise by a damages award (*Whiten*) and acknowledging that damages can be an unknown commodity (*Apotex*). The facts, on which the punitive damages award was granted, were clearly pleaded by Ms. Rer. Besmont had the opportunity to object to and clarify the characterisation of its conduct. It should be of no ‘surprise’ to Bestmont that the characterisation of its conduct would fall within the scope of a punitive damages award. Therefore, the court should reinstate the Trial Judge’s award of punitive damages in the amount of \$500,000.

*Whiten, supra* para 55 at para 87.  
*Apotex v Pfizer Inc*, 2014 FC 1186 at para 9 [*Apotex*].

**PART V: Order Requested**

[60] The Appellant respectfully requests for the COA’s decision to be reversed and the Trial Court’s decision to be reinstated.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 14<sup>th</sup> day of January, 2022

Team 5

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Counsel for the Appellant

## PART VI: Table of Authorities

### LEGISLATION

*Copyright Act*, RSC 1985, c C-42.

Bill C-11, *An Act to amend the Copyright Act*, 1st Sess, 41st Leg, Federal, 2012 (assented to 29 June 2012).

### JURISPRUDENCE

*Apotex v Pfizer Inc*, 2014 FC 1186.

*Bell Canada v L3D Distributing Inc*, 2021 FC 832.

*Bestmont Hotels v Wanda Rer*, 2021 CAIP 333.

*Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57 citing *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34.

*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13.

*Collett v Northland Art Company Canada Inc*, 2018 FC 269.

*Corocord Raumnetz GMBH v Dynamo Industries Inc*, 2016 FC 1369 at para 85(4).

*Goldi Productions Ltd v Bunch*, (1 August 2018), Brampton 15/5800 (Ont Sup Ct J).

*Hay v Sloan*, 1957 SCO 27 at para 7

*Kraft Canada Inc v Euro Excellence Inc*, 2007 SCC 37.

*Lubrizol Corp v Imperial Oil Ltd*, [1996] 3 FC 40, [1996] FCJ No 454.

*Rallysport Direct LLC v 2424508 Ontario Ltd*, 2020 FC 794.

*Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35.

*TFI Foods Ltd v Every Green International Inc*, 2021 FC 241 citing *Lam v Chanel S de RL*, 2017 FCA 38.

*Trader Corp v CarGurus Inc*, 2017 ONSC 1841.

*Wanda Rer v Bestmont Hotels*, 2021 TCCIP 1222.

*Whiten v Pilot Insurance Co*, 2002 SCC 18.

## SECONDARY MATERIALS

Daniel J Gervais, “Canadian Copyright Law Post-CCH” (2004/2005) 18 IPJ 131.

Gordon Brown, “Bill C-11, An Act to amend the Copyright Act” (Legislative Debate held at the House of Commons, Ottawa, February 8 2012), Vol 146 Hansard 76.