

**IN THE 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] Adequate compensation for creators is at the heart of Canadian copyright law. This Court has a duty to protect the original work of creators from the high-handed actions of sophisticated corporations. It must now consider how to compensate a creator when a corporation oversteps the bounds of users' rights and takes an independent artist's work without their permission.

[2] The Appellant, Ms. Rer, is an independent and innovative photographer. The Respondent, Bestmont Hotels, infringed Ms. Rer's copyright in her photographs. The Trial Judge righted this wrong by ordering Bestmont to pay \$1.5 million in damages. The Court of Appeal incorrectly overturned that judgment. This Court should now allow this appeal for three reasons.

[3] First, Ms. Rer owns copyright in her 10 original photographs, 40 filtered photographs and the compilation of photographs because she exercised skill and judgment in creating each of them. Second, Bestmont infringed each of Ms. Rer's 51 works by copying her original photographs, adding similar filters, and hanging the collection in spaces frequented by paying guests. Third, Ms. Rer is entitled to the highest quantum of damages because Bestmont substantially infringed multiple works and acted in bad faith. This Court must deter such behaviour.

[4] The Court of Appeal erred by finding that Bestmont's underlying copyright in the design of its hotels and marquees allowed it to use Ms. Rer's photographs. Ms. Rer asks this Court to restore the Trial Judge's decision in part, recognizing Bestmont infringed 51 works: 10 original photographs, 40 filtered photographs, and a compilation of photographs.

## **PART II: STATEMENT OF FACTS**

[5] Ms. Rer is an experienced Canadian artist, photographer, and social media influencer. For the past decade, Ms Rer's photographs of her travels around the world have attracted social media followers to her web page. Bestmont is a large corporation with multiple hotels across Canada.

*Rer v Bestmont Hotels*, 2021 TCCIP 1222 at paras 1, 2, 7, 11 [*Trial*].

[6] Ms. Rer travelled across Canada for a year to photograph Bestmont’s hotels. Ms. Rer used her experience as a photographer to determine the best distance to frame the marquees and hotel faces. She took 10 photographs (“Original Photos”) from 100 feet. Using her social media experience, Ms. Rer selected and applied four filters to each of the Original Photos to create 40 filtered photographs (“Filtered Photos”). Collectively, the 50 photographs are the “Façade Photos.”

*Trial, supra* para 5 at paras 3-5.

[7] Ms. Rer offered to license her Original Photos and Filtered Photos to Bestmont to use for marketing. She provided Bestmont with a compilation of copies of the Façade Photos ("Façades Project") on a portable disk drive. Bestmont rejected Ms. Rer's proposal and accused her of infringing its registered copyright in its marquee and hotel design. Bestmont took the Original Photos from Ms. Rer and applied many of the same filters to the photos. Bestmont then wrongfully used the photographs to decorate the interior of its hotels without any attribution to Ms. Rer.

*Trial, supra* para 5 at paras 6-8.

[8] Ms. Rer repeatedly requested Bestmont remove her photographs from its hotels. Bestmont ignored Ms. Rer's requests. As a result, Ms. Rer commenced a claim alleging copyright infringement, seeking a permanent injunction, and the highest statutory damages allowable pursuant to section 38.1 of the *Copyright Act* (“Act”).

*Trial, supra* para 5 at para 9.  
*Copyright Act*, RSC 1985, c C-42, s 38.1 [*The Act*].

[9] The Trial Judge correctly found Bestmont infringed Ms. Rer's copyright for a commercial purpose. The Trial Judge awarded \$20,000 for each of the 50 Façade Photos infringed totalling \$1,000,000 and an additional \$500,000 to punish Bestmont’s reprehensible conduct.

*Trial, supra* para 5 at paras 16, 19-20.

[10] The Court of Appeal reversed the Trial Judge's decision and found Bestmont's underlying copyright in the hotel design and marquees made it immune from infringing Ms. Rer's copyright. The Court also incorrectly minimized the quantum of damages.

*Bestmont Hotels v Rer*, 2021 CAIP 333 at para 1-2, 6-8 [*Appeal*].

### **PART III: POINTS IN ISSUE**

[11] This appeal raises three issues:

1. Did the Court of Appeal err by ruling Ms. Rer does not own copyright in the Façade Photos?
2. Did the Court of Appeal err by determining Bestmont did not infringe Ms. Rer's copyright?
3. Did the Court of Appeal err in minimizing the quantum of damages Ms. Rer is entitled to?

[12] Ms. Rer submits that the answer to each of these questions is yes.

### **PART IV: ARGUMENTS IN BRIEF**

#### **1. Ms. Rer owns copyright in the Façade Photos**

[13] Ms. Rer owns copyright in the Façade Photos because they are original works. Section 5 of the *Act* requires that copyright subsist in "every original ... artistic work" that is fixed in a tangible medium and authored by a Canadian citizen or resident of a treaty nation. Section 2 of the *Act* defines "artistic works" as including photographs. Ms. Rer's Façade Photos are fixed in a tangible form on a portable disk. Ms. Rer is also a Canadian citizen.

*The Act*, *supra* para 8 at ss 5, 2.

[14] Ms. Rer's Façade Photos are original and enjoy copyright because she exercised skill and judgment in creating each work. The Court of Appeal misapplied the test for originality in finding the Façade Photos were not original works protected by copyright. In *CCH*, the Supreme Court of Canada ("SCC") established that the threshold for originality only requires an author "exercise skill and judgment." The Trial Judge accurately applied this test. Ms. Rer's Façade Photos satisfy

the threshold of originality because she exercised skill and judgment in: (a) capturing the Original Photos; (b) selecting and applying specific filters to the Filtered Photos; and (c) selecting and arranging the Façades Project.

*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 23 [CCH].

[15] The SCC defined skill and judgment as an author’s “knowledge, developed aptitude or practiced ability in producing the work” and “capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work” (CCH). In *Trader*, the Ontario Superior Court held that the photos taken of each vehicle were original because the photographers exercised skill and judgment acquired through their photography experience when capturing each photograph. The Court recognized that skill and judgment may be demonstrated through a photographer’s experience and their ability to account for variables such as “subject matter, angles, staging, and framing.” Similarly, in *Rallysport*, the Federal Court held that the photographs of auto parts and accessories were original because the photographers exercised skill and judgment when deciding between different staging and framing options. In assessing the skill and judgment Ms. Rer applied capturing her photographs, this Court should consider the decade of experience she applied when staging and framing the marquees in each photo.

*CCH, supra* para 14 at paras 16, 30.

*Trader v CarGurus*, 2017 ONSC 1841 at para 24 [*Trader*].

*Rallysport Direct LLC v 2424508 Ontario Ltd*, 2019 FC 1524 at para 47 [*Rallysport*].

***a) Ms. Rer exercised skill and judgment in capturing each photograph***

[16] Ms. Rer's Original Photos should individually be recognized as original works protected by copyright. Ms. Rer exercised skill and judgment by applying her knowledge and developed aptitude as a photographer with a decade of experience when capturing each photograph. Her experience and knowledge ensured all photographs consistently focused on the marquees while highlighting the unique design of each hotel face, just as the photographers in *Trader* were able to

use their experience to ensure all photographs of the vehicles highlighted their best features. Ms. Rer also exercised skill and judgment by accounting for various staging and framing options of the hotel designs and marquees to decide that 100 feet was the optimal distance to capture each of her photographs. Her specific choice of distance enhanced the depiction of the hotel designs and marquees in her photographs, just as the photographers in *Rallysport* selected staging and framing that enhanced the depiction of the auto parts and accessories in their photographs. Additionally, Ms. Rer consistently exercised her skill and judgment at each subsequent hotel.

*Trader, supra* para 15 at para 24.  
*Rallysport, supra* para 15 at para 47.

[17] The Court of Appeal erred in reducing Ms. Rer's efforts to a merely mechanical exercise because it failed to recognize the experience that informed her skill and judgment. According to *CCH*, originality does not require creativity "in the sense of being novel or unique," but instead requires the exercise of skill and judgment "not be so trivial that it could be characterized as a purely mechanical exercise." Chief Justice McLachlin defined "a purely mechanical exercise" by using the example of changing the font in a literary work (*CCH*). Making an aesthetic change to a literary work is different than Ms. Rer applying the aesthetic judgment of taking each photograph using a similar technique and camera set-up – a decision inherent to the creativity of the work. Capturing each photograph using a similar technique and camera set-up at each Bestmont location demonstrates Ms. Rer's exercise of skill and judgment in ensuring each captured photograph could "compare and contrast the similarities and differences in the design and atmosphere" (*Trial*).

*CCH, supra* para 14 at paras 16, 25.  
*Trial, supra* para 5 at para 4.

***b) Ms. Rer exercised skill and judgment in selecting and applying filters to each photograph***

[18] Ms. Rer's Filtered Photos should individually be recognized as original works protected by copyright. The Court of Appeal erred in finding "there was nothing original about the filters chosen

and applied" because it failed to appreciate the skill and judgment Ms. Rer exercised in selecting particular filters. Ms. Rer specifically selected certain filters based on the "effect they would have on the depiction of the hotel design and marquee." Applying particular filters demonstrates Ms. Rer's exercise of skill and judgment because she used her knowledge of "millennial style and culture" to recognize what would appeal to her audience and help better depict her subject matter. In *Gould*, the Ontario Court of Appeal found the photographer exercised skill and judgment in selecting and applying specific appropriate captions to his photographs. The Court found the captions were individually copyrighted because the photographer selected specific captions from many options. Similarly, given there were "other readily available filters" Ms. Rer could have chosen from, demonstrates she exercised skill and judgment when deciding which filters to use.

*Appeal, supra* para 10 at para 5.

*Trial, supra* para 5 at para 5.

*Gould Estate v Stoddard Publishing Co*, [1998] OJ No 1894 at para 17 [*Gould*].

[19] Ms. Rer's exercise of selecting and applying filters is different from a mechanical enhancement of photographs. In *Goldi*, the Court found the photographer's simple enhancement of photographs was a mechanical exercise. In that case, the photographer did not select enhancements to appeal to his audience. Ms. Rer did select and apply each filter with an intended effect for the audience. Ms. Rer then chose each filter based on her knowledge of their popularity and enhanced effect on the Original Photos knowing she would present them to Bestmont.

*Goldi Productions Ltd et al v Bunch* (1 August 2018), Brampton 15-5800 (Ont Sm Cl Ct) at para 15 [*Goldi*].  
*Trial, supra* para 5 at para 19.

***c) Ms. Rer exercised skill and judgment in selecting and arranging the Façades Project***

[20] In addition to each of the Original Photos and Filtered Photos, Ms. Rer has copyright over the Façades Project compilation. The Court of Appeal correctly recognized copyright "vests in the



[Façades Project] as a whole" because Ms. Rer exercised skill and judgment in the selection and arrangement of the Façade Photos included in the Façades Project.

*Appeal, supra* para 10 at para 5.

[21] Section 2 of the *Act* defines "compilation" as "a work resulting from the selection or arrangement of ... artistic works." The Federal Court in *Maltz* held copyright in a compilation requires skill and judgment in selecting and arranging individual works. Ms. Rer exercised skill and judgment in specifically selecting the Original Photos, the four filters, and the Filtered Photos to include and arrange in her Façades Project. Each photograph in the Façades Project was selected and arranged based on its ability to "compare and contrast the similarities and differences in the design and atmosphere." This exercise in selecting and arranging the photographs is sufficient to grant Ms. Rer copyright in the Façades Project as well as the Original Photos and Filtered Photos.

*Slumber-Magic Adjustable Bed v Sleep-King Adjustable Bed*, [1984] BCWLD 3079 at para 17 in *Maltz v Witterick*, 2016 FC 524 at para 26 [Maltz].  
*The Act*, *supra* para 8 at s 2.

## **2. Bestmont infringed Ms. Rer's copyright in the Façade Photos**

[22] Ms. Rer, as the copyright owner of the Façade Photos, is protected against infringement under the *Act*. The Court of Appeal erred by misconstruing the scope and effect of Bestmont's copyright because: (a) Bestmont substantially reproduced Ms. Rer's original expression in the Façade Photos; and (b) Bestmont's copyright in its marquee and hotel design does not extend to the Façade Photos.

### ***a) Bestmont substantially reproduced Ms. Rer's original expression in the Façade Photos***

[23] Bestmont's unauthorized reproduction of a substantial portion of Ms. Rer's original expression in the Façade Photos, without her authorization, is an infringement of her copyright. The *Act* protects original artistic works from unauthorized use of "the work or any substantial part thereof." In *Cinar*, the SCC established substantial reproduction is determined in relation to the

author's original expression in a substantial portion of the work. Bestmont substantially reproduced Ms. Rer's original expression because: (i) Bestmont used Ms. Rer's Original Photos; (ii) Bestmont applied the same filters as Ms. Rer; and (iii) Bestmont copied Ms. Rer's selection and arrangement of the Façades Project.

*Cinar Corporation v Robinson*, 2013 SCC 73 at para 26 [*Cinar*].  
*The Act*, *supra* para 8 at s 3(1).

***i) Bestmont used Ms. Rer's Original Photos***

[24] Ms. Rer's original expression is derived from her exercise of skill and judgment in capturing the Original Photos from 100 feet to focus on each hotel's marquee and design. By admitting to having reproduced Ms. Rer's Original Photos, Bestmont took Ms. Rer's original expression. Consequently, Bestmont infringed Ms. Rer's copyright in her Original Photos.

***ii) Bestmont applied the same filters as Ms. Rer***

[25] Bestmont substantially reproduced Ms. Rer's original expression in the Filtered Photos by using filters that provide a similar "depiction of the hotel design and marquee." The original expression in the Filtered Photos was a result of Ms. Rer's skill and judgment in selecting and applying filters based on her knowledge of each filter's popularity and the enhanced effect each filter had. By applying the same filters as Ms. Rer, Bestmont infringed her copyright.

*Trial*, *supra* para 5 at para 5.

[26] Bestmont's use of a different editing software, which created some visible differences, is not a defence to infringement. The Court of Appeal erred in overlooking the fact Bestmont chose "filters corresponding to those suggested by Ms. Rer." The *Act* defines "infringing" to include "any colourable imitation" of a work. In *Cinar*, the SCC held: "the alteration of copied features or their integration into a work that is notably different from the plaintiff's work does not necessarily preclude a claim that a substantial part of a work has been copied." Although the defendants in

*Cinar* changed several of the main characters from animals to humans and added new characters, the SCC found the infringement was still substantial. If substituting animals for humans and adding new characters is a substantial reproduction, then substituting software and applying additional filters is also a substantial reproduction.

*Cinar, supra* para 23 at para 39.  
*The Act, supra* para 8 at s 2.

**iii) Bestmont copied Ms. Rer's selection and arrangement of the Façades Project**

[27] The Façades Project reflects Ms. Rer's original expression in applying her skill and judgment to select 10 specific photographs to filter and arranging them to create a work that "could compare and contrast the similarities and difference in the design and atmosphere" of Bestmont's hotels. Bestmont selected and arranged the same Original Photos as Ms. Rer to create its collection. By copying Ms. Rer's exercise of skill and judgment in selecting and arranging all the photographs, Bestmont infringed Ms. Rer's copyright in the Façades Project.

**b) Bestmont's copyright does not extend to Ms. Rer's Façade Photos**

[28] The Court of Appeal misconstrued the scope of Bestmont's copyright in the marquee and hotel design by finding it extends to Ms. Rer's Façade Photos. Only countries that have adopted the doctrine of derivative works have a scope of copyright that extends to subsequent works in a different material form. The doctrine of derivative works does not apply in Canada (*Théberge*). As the copyright owner of the Façade Photos, only Ms. Rer has the right to produce or reproduce her photographs. Even if this Court finds Bestmont has underlying rights in Ms. Rer's photographs, those rights do not exempt it from requiring Ms. Rer's authorization to reproduce her work.

*Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34 at para 73 [*Théberge*].

[29] Ms. Rer exercised her rights under the *Act* when capturing her photographs. Section 32.2(1)(b)(ii) states that it is not an infringement of copyright to photograph architectural works.

An architectural work includes any structure (*Lainco*). *Black's Law Dictionary* defines a “structure” as “any construction...composed of parts purposefully joined together.” Since Bestmont’s hotel design and marquees are purposefully built constructions, they are structures and are therefore architectural works. In photographing Bestmont’s hotels, Ms. Rer was exercising her explicit user rights under the *Act* in pursuit of her creative livelihood. Given the *Act* does not provide a similar exemption to Bestmont, it infringed Ms. Rer’s copyright in 51 works.

*The Act, supra* para 8 at ss 32.2, 3(1).

*Lainco Inc v Commission scolaire des Bois-francs*, 2017 CF 825 at para 45 [*Lainco*].

Brian A Garner, ed, *Black's Law Dictionary*, 11th ed (Thomson Reuters, 2019) sub verbo “structure” [Garner].

### **3. Ms. Rer is entitled to the highest quantum of damages**

[30] Ms. Rer is claiming \$1,520,000 in damages as compensation for each of the 51 works infringed and punishment for Bestmont’s reprehensible conduct. The Court of Appeal erred in two ways. First, it failed to properly apply the criteria in section 38.1(1)(a) of the *Copyright Act* with respect to statutory damages. Second, it mischaracterized the Trial Judge’s award of \$500,000.

#### ***a) Ms. Rer is entitled to the maximum of statutory damages***

[31] Ms. Rer is entitled to \$20,000 for each of the 51 works Bestmont infringed because: **(i)** statutory damages are calculated based on each work infringed; **(ii)** Bestmont’s use of the Façade Photos and Façades Project was commercial in nature; **(iii)** Bestmont substantially infringed, acted in bad faith, and deterrence is necessary; and **(iv)** Bestmont’s evidence does not support any reduction of damages.

#### ***i) Statutory damages are calculated based on each work infringed***

[32] The *Act* entitles Ms. Rer to statutory damages calculated on the infringement of 51 works: 10 Original Photos, 40 Filtered Photos, and the Façades Project compilation. The Court of Appeal arbitrarily determined that \$15,000 would be an adequate award of damages and ignored both the

wording of section 38.1 and the Trial Judge’s findings of fact. It failed to properly apply section 38.1(1)(a) of the *Act*, which states statutory damages are awarded “for each work.” This Court should follow the Federal Court’s interpretation of section 38.1(1)(a). In *Thomson*, the Federal Court calculated statutory damages based on each infringed obituary and in *Nintendo*, the Federal Court similarly calculated damages based on each infringed game. The Federal Court held the “work-based award is more harmonious with the *Act*” because “if the owner of a single work may claim all remedies for infringement of that one work, it follows that the owner of multiple works is entitled to a separate remedy for each infringed work” (*Nintendo*).

*Appeal, supra* para 10 at para 9.  
*Nintendo of America Inc v King 2017 FC 246* at para 128, 138 [*Nintendo*].  
*Thomson v Afterlife Network Inc, 2019 FC 545* at para 4, 64 [*Thomson*].  
*The Act, supra* para 8 at s 38.1.

[33] The Court of Appeal should have followed the Trial Judge’s reasons, which correctly calculated statutory damages based on finding Bestmont infringed each of Ms. Rer’s works. Although the Trial Judge excluded the compilation, their method of calculation was aligned with the *Act*. Bestmont infringed each of the 50 Façade Photos and subsequently developed a collection of 120 photographs “clearly inspired” by Ms. Rer’s Façades Project. Ms. Rer is entitled to damages based on 51 works because Bestmont infringed each of the individually protected works.

*Trial, supra* para 5 at paras 20, 18-19.  
*Appeal, supra* para 10 at para 6.

***ii) Bestmont’s use of the Façade Photos and Façades Project was commercial in nature***

[34] Ms. Rer is entitled to the highest level of statutory damages for commercial infringement under section 38.1(1)(a) of the *Act*. By displaying the infringing photographs in areas frequented by paying guests, Bestmont used Ms. Rer’s Façade Photos and Façades Project as internal marketing tools. The Court of Appeal failed to recognize the commercial nature of Bestmont’s

infringement when it stated: “there was no evidence Bestmont’s use of the photographs generated any additional revenue.”

*Appeal, supra* para 10 at para 7.

*The Act, supra* para 8 at s 38.1.

[35] Profit is not a requirement for commercial infringement. The Court of Appeal incorrectly interpreted section 38.1(1)(a) by requiring profit for a finding of commercial purpose. Courts must apply the modern approach to statutory interpretation whereby “the words of an Act are read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo*). The ordinary sense of “commercial” can be understood through *Black’s Law Dictionary’s* definition: “relating to or connected with trade and traffic or commerce in general.” When distinguishing between commercial and non-commercial infringement, the Members of Parliament characterized non-commercial purposes with examples like: “recording a home video of a child dancing to a song” or downloading music to create original mixes. Parliament amended subsection 38.1(1) of the *Act* to protect small individual users in their private homes from facing substantial fines.

*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 26 at para 21 [*Rizzo*].

*The Act, supra* para 8 at s 38.1.

Garner, *supra* para 29 sub verbo “commercial”.

Bill C-11, “An Act to amend the Copyright Act”, 2nd reading, *House of Commons Debates*, 41-1, No 31 (18 October 2011) at 1035, 1040 (Hon Christian Paradis).

Bill C-11, “An Act to amend the Copyright Act”, 2nd reading, *House of Commons Debates*, 41-1, No 31 (18 October 2011) at 1035, 1050 (Hon James Moore - Minister of Canadian Heritage and Official Languages).

[36] Judicial treatment of “commercial purpose” similarly requires no direct profit resulting from infringement. In *Collett*, the Federal Court found the defendant’s continued publication of the plaintiff’s work on their website was infringement for a commercial purpose even though the publication did not directly generate profit. Similarly, in *Young*, the Court held the unauthorized use of a sound recording in an advertisement video was a commercial infringement even though

the defendant's video did not generate any direct profit. Commercial purpose includes any activity that supports or promotes the generation of revenue, including the indirect profit from infringement. Bestmont's use of Ms. Rer's works is commercial infringement.

*Collett v Northland Art Company Canada Inc*, 2018 FC 269 at para 37, 49, 59 [*Collett*].  
*Young v. Thakur* 2019 FC 835 at para 45 [*Young*].

[37] Bestmont's use is a commercial infringement because the Façade Photos and the Façades Project promoted the generation of revenue. Bestmont's use of Ms. Rer's work is analogous to the defendants in both *Collett* and *Young* because each of them used another copyright owner's work to promote or enhance their own services. Bestmont used Ms. Rer's photographs to improve its paying guests' authentic experience and to promote its other locations. Bestmont used the Façade Photos and the Façades Project to further their business interests. Bestmont is not a small person making a home video; it is a large corporation that displayed Ms. Rer's work in multiple locations across the country to improve guest experience and encourage repeat business.

*Young, supra* para 36 at para 45.  
*Collett, supra* para 36 at para 37, 49, 59.  
*Trial, supra* para 5 at para 2.

***iii) Bestmont substantially infringed, acted in bad faith, and deterrence is necessary***

[38] Ms. Rer is entitled to the highest quantum of statutory damages, totalling \$20,000 per work. A fundamental goal of the *Act* is "to prevent someone other than the creator [of a work] from appropriating whatever benefits may be generated" (*Théberge* in *Cinar*). The Court of Appeal failed to recognize that: Bestmont copied Ms. Rer's entire Façades Project; Bestmont ought to have known it was infringing Ms. Rer's copyright; and Bestmont's actions needs to be deterred to prevent further infringements.

*The Act, supra* para 8 at s 38.1.  
*Théberge, supra* para 28 at para 30 in *Cinar, supra* 24 at para 139.

***Bestmont copied Ms. Rer’s entire Façades Project***

[39] The scope of Bestmont’s infringement is substantial and the quantum of statutory damages should reflect this. The Court of Appeal failed to recognize the scope and degree of Bestmont’s infringement of Ms. Rer’s work. The Federal Court has frequently awarded the maximum amount of \$20,000 per work infringed where defendants have copied substantial or entire works. In *Microsoft*, the Federal Court awarded \$20,000 per infringement because the defendant infringed entire copies of software programs. In *Louis Vuitton* and *Wang*, the Federal Court similarly ordered \$20,000 per infringement because the defendant reproduced entire Louis Vuitton monogram prints on counterfeit products. By selecting and using Ms. Rer’s Original Photos and applying similar filters, Bestmont “reproduced essentially the entire” Façade Photos. Ms. Rer is entitled to the maximum amount of \$20,000 for each of the 51 works because like the defendants in *Microsoft*, *Louis Vuitton* and *Wang*, Bestmont copied each of Ms. Rer’s entire works.

*Microsoft Corporation v 90383746 Quebec Inc 2006 FC 1509* at para 1 [*Microsoft*].  
*Louis Vuitton Malletier SA v Yang, 2007 FC 1179* at para 11 [*Louis Vuitton*].  
*Louis Vuitton Malletier SA v Wang 2019 FC 1389* at para 114 [*Wang*].  
*Trial, supra* para 5 at para 23.

***Bestmont ought to have known it was infringing copyright***

[40] Ms. Rer is entitled to the highest award of statutory damages because Bestmont ought to have known that deliberately reproducing each of the Façades Photos would infringe Ms. Rer’s copyrights. The Court of Appeal erred by ignoring the fact that Bestmont, by having registered copyright in the marquee and hotel design, ought to have known its actions would constitute copyright infringement. As a sophisticated company with its own copyright, Bestmont ought to have been familiar with copyright protection.

*Trial, supra* para 5 at para 11.



[41] The Federal Court has found bad faith exists when defendants “knew or ought to have known the extent of and enduring harm caused by their infringing activities” and the defendants “knowingly and deliberately” participated in the infringement (*Bell Canada*). The Federal Court has awarded a high quantum of statutory damages where defendants are operating large-scale businesses and have the capacity to understand their conduct is infringing copyright (see *Bell Canada*, *Nintendo*, *Snigga*, *Microsoft*, and *Louis Vuitton*). In *Bell Canada*, the defendants were corporations with multiple locations who “knowingly and deliberately authorized and induced unlawful re-broadcasts of the Plaintiff’s Programs.” In *Nintendo*, the defendant was a corporation with a retail location and commercial websites. Like in each of these cases, Bestmont is a sophisticated company with hotels across the country and has experience with copyright.

*Bell Canada v L3D Distributing Inc (INL3D)*, 2021 FC 832 at paras 100, 16-17, 102 [*Bell Canada*].

*Nintendo*, *supra* para 32 at paras 155, 15.

*Louis Vuitton Malletier SA v Singa Enterprises (Canada) Inc*, 2011 FC 776 at para 26.

*Microsoft*, *supra* para 39 at para 1.

*Louis Vuitton*, *supra* para 39 at para 11.

*Trial*, *supra* para 5 at paras 2, 11.

[42] Bestmont’s deliberate deception of Ms. Rer, while ignoring her repeated requests to return her Façades Project, amounts to bad faith. This justifies the highest statutory damages award of \$20,000 per work. In *Bell Canada*, the Federal Court found the defendant’s conduct was bad faith because they ignored the Court’s process and did not provide any response to the plaintiffs (*Bell Canada*). Similarly, in *Nintendo*, the Federal Court awarded \$20,000 per work because the defendant deliberately took steps to conceal their infringement. Bestmont acted in bad faith because it deliberately deceived Ms. Rer into believing it was not interested in her photographs. Instead, once Bestmont got the original copies, it reproduced her work and hung the photographs in the hallways of its hotels. Like the conduct in *Bell Canada*, despite Ms. Rer’s repeated attempts,

Bestmont did not respond, and refused to return Ms. Rer's portable disk drive. Bestmont only agreed to remove the infringing Façade Photos right before trial to avoid the requested injunction.

*Bell Canada, supra* para 41 at paras 102, 100.

*Nintendo, supra* para 32 at para 154.

*Appeal, supra* para 10 at paras 10, 11.

[43] Bestmont has admitted to reproducing the Original Photos and it replicated Ms. Rer's Filtered Photos to create a collection of 120 photographs that it displayed to paying guests across the country. Bestmont ought to have known this act would infringe Ms. Rer's copyright, and yet deliberately chose to copy Ms. Rer's work. These acts of bad faith entitle Ms. Rer to the highest award of statutory damages.

*Trial, supra* para 5 at para 2.

***Bestmont must be deterred to prevent additional infringements***

[44] Ms. Rer is entitled to the highest award of statutory damages per work to deter Bestmont and other large corporations from infringing the work of independent creators like Ms. Rer. Bestmont caused Ms. Rer disproportionate harm and took advantage of her position as an independent artist. The Court of Appeal failed to recognize the need to deter infringing behavior affecting small and independent creators. This Court should follow the reasoning of the Federal Court in *Nintendo*, which stated: "statutory damages should be significant enough to deter others who may wish to engage in similar illicit activities and also to deter the [defendant] from resuming such activities." Through the *Act*, Parliament has indicated its intention to protect investments made by the creative industry (*Nintendo*). In *Nintendo*, where the Federal Court awarded \$20,000 per work, the Court recognized the need for deterrence because of the disproportionate harm caused to copyright owners.

[45] Bestmont's behaviour disproportionality caused harm to Ms. Rer because Bestmont reproduced multiple of Ms. Rer's entire works which took a year to compile into the Façades

Project. This behaviour has disproportionality caused harm to Ms. Rer and can transcend into other content creator space. Without proper deterrence, the erosion of the independent content creator space will hurt independent artists.

*Nintendo, supra* para 32 at paras 163-164.

[46] Allowing Bestmont to take advantage of Ms. Rer by awarding minimal damages, as the Court of Appeal did, sets a bad example that other large corporations may follow. In *Snigga, Louis Vuitton* and *Wang*, the Federal Court awarded the maximum amount of \$20,000 per work to emphasize unauthorized reproduction will not be tolerated and “to deter open disrespect for Canada’s copyright protection laws” (*Louis Vuitton*). As a corporation with hotels across Canada, Bestmont abused its power relative to Ms. Rer. Bestmont took advantage of the good faith with which Ms. Rer presented it her work and infringed her work in the name of creating an “authentic Bestmont hotel experience.” If Ms. Rer is not awarded the maximum amount of \$20,000 per work, Bestmont and other large corporations will see infringement as a cheap alternative to paying independent artists their worth.

*Singga, supra* para 41 at para 157.

*Louis Vuitton supra* para 39 at para 25.

*Wang, supra* para 39 at para 196.

*Trial, supra* para 5 at para 2.

***iv) Bestmont’s evidence does not support any reduction of damages***

[47] Ms. Rer is entitled to the highest quantum of damages because the facts do not justify the Court of Appeal reducing the Trial Judge’s award of damages. The Court of Appeal erred by stating the Trial Judge should have applied section 38.1(3) to reduce the damages award because Bestmont did not submit evidence that satisfies the requirements in subsections 38.1(3)(a)(i) and 38.1(3)(b). Bestmont has not shown that first, there is more than one work in a single medium and second, the damages awarded are grossly out of proportion to the infringement.

*The Act, supra* para 8 at s 38.1.

[48] Subsection 38.1(3) is an exception to the general rule of statutory damages and as such Bestmont bears the burden of establishing there was more than one work in a single medium and of showing the disproportionality of the damages. Ms. Rer submits there are three mediums which have been infringed, totalling 51 works: her Original Photos, her Filtered Photos, and her Façades Project. Additionally, the Federal Court requires evidence of the defendant's revenues and profits in relation to the infringement to determine whether the quantum of statutory damages "is grossly out of proportion to the infringement" (*Act*). Because Bestmont did not provide the relevant evidence to support lowering statutory damages for commercial infringement under section 38.1(3), Ms. Rer's award of statutory damages cannot be lowered beyond the minimum amount stated in the *Act*.

*The Act, supra* para 8 at s 38.1.

*Nintendo, supra* para 32 at para 149.

***b) Ms. Rer is entitled to the additional \$500,000 awarded at trial***

[49] The Court of Appeal erred in denying Ms. Rer the additional \$500,000 the Trial Judge awarded. First, the Court of Appeal had the discretion to award the damages under another head of damages. Alternatively, the Court of Appeal erred in characterizing the additional damages awarded as punitive damages.

*Trial, supra* para 5 at para 8.

*Appeal, supra* para 10 at para 1.

***i) The Court of Appeal had the discretion to uphold the award of damages***

[50] The Court of Appeal should have awarded the \$500,000 under another head of damages. Other appeal courts have applied this concept. In *Wilson 2*, the Court of Appeal changed a mistaken award of punitive damages to an award for the breach of the duty of good faith. In that case, the defendant owed the plaintiff a duty of good faith because the defendant was an insurer, and the

plaintiff was a claimant. As a result of the insurer breaching that duty, the Trial Judge awarded punitive damages when none were pled by the claimant. The Court of Appeal set aside the award for punitive damages and converted the value of punitive damages into an “award of damages in respect of the breach of the duty of good faith” (*Wilson 2*).

*Saskatchewan Government Insurance v Wilson* 2012 SKCA 106 at para 65 [*Wilson 2*].  
*Wilson v Saskatchewan Government Insurance* 2010 SKQB 211 at para 119 [*Wilson 1*].

[51] The Trial Judge found Bestmont acted in bad faith, like the defendant in *Wilson 1*. Although their relationship is different, Bestmont would not have had access to Ms. Rer’s photographs but for Ms. Rer approaching the corporation in good faith. Bestmont’s attempt to take advantage of Ms. Rer’s good faith amounted to bad faith. These actions were so serious that the Trial Judge saw fit to award the maximum quantum of damages for each of the 50 works they found were infringed. Rather than finding the Trial Judge awarded punitive damages, the Court of Appeal should have changed the damages heading like the Court of Appeal did in *Wilson 2*.

*Wilson 1, supra* para 52 at para 119.  
*Wilson 2, supra* para 52 at para 65.  
*Trial, supra* para 5 at paras 24, 25, 6-7.

***ii) Alternatively, the Court of Appeal mischaracterized the \$500,000 as punitive damages***

[52] The Court of Appeal erred in characterizing the additional damages as punitive because they were not pled and the Trial Judge made their intention to award statutory damages clear. The Trial Judge identified the entirety of the damages award as statutory damages, which “should be granted in the amount of \$1,500,000. [They] arrived at this amount by awarding \$20,000 for each of the fifty works infringed, plus an additional \$500,000 to punish Bestmont for its reprehensible conduct.” The SCC in *Whiten* states punitive damages must be pled to be awarded. Ms. Rer never pled punitive damages, and the Trial Judge emphasized three times the damages awarded were only statutory.

*Trial, supra* para 5 at paras 8, 22, 24-26, 20  
*Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 86 in *Bauer Hockey Corp v Sport Masko Inc (Reebok-CCM Hockey)*, 2014 FCA 158 at para 26 [*Bauer*]

[53] The Trial Judge found that Bestmont’s bad faith merited correspondingly high statutory damages. Under section 38.1(1)(a) of the *Act*, the Trial Judge has a duty to award “just” damages. Upon finding Bestmont acted in bad faith, the Trial Judge increased the damages award to a degree that they deemed just under the circumstances. The Trial Judge did not make an error as to the magnitude of the harm that Bestmont effected on Ms. Rer – rather, if there was an error in the calculation of damages it was only mathematical in nature.

*Trial, supra* para 5 at para 25  
*The Act, supra* para 8 at s 38.1.

[54] In conclusion, we ask this Court to award Ms. Rer \$20,000 for each of the 51 works infringed by Bestmont—totaling \$1,020,000 – and maintain the additional \$500,000 in statutory damages because (a) Bestmont’s infringement was substantial; (b) Bestmont acted in bad faith and deterrence is necessary to ensure this does not happen again; (c) subsection 38.1(3) of the *Act* is not applicable; and (d) the Court of Appeal had the discretion to maintain the additional \$500,000.

#### **PART V: ORDER REQUESTED**

[55] Ms. Rer seeks the following:

1. an order allowing the appeal;
2. the decision by the Trial Judge be restored in part;
3. all 51 works considered for the award of statutory damages; and
4. such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of January 2022.

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Team 6A

Counsel for Ms. Rer

## **PART VI: TABLE OF AUTHORITIES**

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### **Secondary Materials**

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Bill C-11, “An Act to amend the Copyright Act”, 2nd reading, House of Commons Debates, 41-1, No 31 (18 October 2011) at 1035, 1050 (Hon James Moore- Minister of Canadian Heritage and Official Languages)