**IN THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS**

BETWEEN:

**WANDA RER**

Appellant

– and –

**BESTMONT HOTELS**

Respondent

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# FACTUM OF THE RESPONDENT

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## PART I: OVERVIEW

[1] The *Copyright Act* ("the *Act*") does not protect a copy.[1] It only protects original works. The *Act* encourages dissemination of original works while protecting creators' interests. To maintain this balance, courts must ensure that copies are not treated as original, and creators do not lose the benefits that copyright affords them. Protecting this delicate balance is at the heart of this appeal.

[2] The Respondent, Bestmont Hotels, is a reputable Canadian hotel company that is renowned for its unique hotel design and marquee. The Appellant, Ms. Wanda Rer is a self-described social media influencer attempting to exploit Bestmont's copyrighted architecture by taking a photographic copy of each Bestmont hotel entrance. After taking these photos, Ms. Rer sought to license Bestmont copies of its own intellectual property at a price well above market value. Bestmont refused Ms. Rer's unsolicited offer. Believing it had the right to use reproductions of its own design, Bestmont altered, printed, framed, and hung the photos in its hotel hallways, thus casting the photos in a different light. Ms. Rer now attempts to prevent Bestmont from using its own intellectual property by wrongfully claiming copyright infringement and damages.

[3] Bestmont asks this Court to uphold the Court of Appeal's ruling and find that copyright does not subsist in Ms. Rer's photos since she exercised no skill or judgment to copy Bestmont's façade. Alternatively, Bestmont did not infringe Ms. Rer's copyright because it did not reproduce a substantial portion of Ms. Rer's photos. Without the infringement, Ms. Rer deserves no damages.

## PART II: FACTS

[4] **Respondent:** Bestmont operates numerous luxury hotels across Canada. It has spent over a century establishing its reputation for designing unique hotels and providing authentic customer experiences. Each hotel entrance consists of a façade, adorned with an instantly recognizable red

[1] *Copyright Act*, RSC 1985 c. C-42 [*Act*].

marquee. To protect its designs, Bestmont registered copyright in its architecture and marquee.[2]

[5] **Appellant:** Ms. Rer is a self-described social media influencer who took photos of Bestmont's ten famous hotel entrances ("Unfiltered Photos"). She repeated the same technique at each location, taking photos of each façade from a distance of 100 feet to prominently feature Bestmont's marquee and unique design.[3] She then applied four popular social media filters to each of the Unfiltered Photos to create an additional 40 photos ("Filtered Photos"). Collectively, the 50 photos are known as the "Façade Collection."

[6] **Alleged Infringement:** Ms. Rer sought to licence the Façade Collection to Bestmont for $3,000 per photo. Bestmont rejected Ms. Rer's attempt and kept the photos of its copyrighted façade. It selected and applied 11 visually distinct filters, using a different photo-editing software than Ms. Rer, to the Unfiltered Photos, making its own collection of 120 photos ("Hotel Photos").[4] Bestmont then printed, framed, and hung the Hotel Photos to decorate its hotel hallways.

[7] At trial, Ms. Rer claimed Bestmont infringed her copyright in the Façade Collection. She sought a permanent injunction and statutory damages. Prior to trial, Bestmont took down the Hotel Photos, making the injunction moot. She did not plead punitive damages.

[8] **Trial Decision:** At trial, Justice Lodge ruled that copyright subsists in the Unfiltered Photos and Filtered Photos. Justice Lodge awarded Ms. Rer $20,000 per photo and an additional $500,000 to punish Bestmont for a total of $1,500,000 in statutory damages.[5]

[9] **Appeal Decision:** The Court of Appeal overturned the Trial Judge's decision, concluding that Bestmont, as the underlying copyright holder in the hotel designs and marquee, is immune from Ms. Rer's allegations. The Court also found that the Unfiltered Photos and Filtered Photos

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[2] *Wanda Rer v Bestmont* Hotels, 21 TCCIP 1222 at para 2 [*Trial*].
[3] *Ibid* at para 4.
[4] *Ibid* at para 6; Fox Moot, "Fox Moot Clarification Questions" (8 December 2021) at 3 [*Clarification Questions*].
[5] *Trial*, *ibid* at paras 16, 22–26.

are not original because Ms. Rer mechanically repeated the same technique to produce each photo.[6]

[10] In *obiter*, the Court stated that, if there was an infringement, $1,500,000 in statutory damages was disproportionate because Bestmont did not act in bad faith and used the Hotel Photos for a non-commercial purpose.[7] The Court also found the Trial Judge's award of $500,000 to punish Bestmont amounted to punitive damages.[8] Ms. Rer has now appealed to this Court.

## PART III: POINTS IN ISSUE

[11] This appeal raises four issues:

A. Did the Court of Appeal correctly find that Ms. Rer had no copyright? Yes.

B. Did the Court of Appeal correctly find that Bestmont did not infringe? Yes.

C. Did the Court of Appeal correctly find the Trial Judge's award was grossly disproportionate to any infringement? Yes.

D. Did the Court of Appeal correctly find Ms. Rer was not entitled to punitive damages? Yes.

## PART IV: ARGUMENTS IN BRIEF

### A. No copyright subsists in the individual or collective photos

[12] The Court of Appeal correctly held that none of Ms. Rer's works are original. The Supreme Court of Canada ("SCC") in *CCH Canadian Ltd v Law Society of Upper Canada* unanimously held that a work is original only when it is "more than a mere copy of another work," and creating that work involved "an exercise of skill and judgment."[9] The skill and judgment "must not be so trivial that it could be characterized as a purely mechanical exercise."[10] None of Ms. Rer's works fulfil these criteria.

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[6] *Bestmont v Wanda Rer*, 2021 CAIP 333 at paras 2, 5 [*Appeal*].
[7] *Ibid* at paras 6–10.
[8] *Ibid* at para 8.
[9] 2004 SCC 13 at para 16 [*CCH*].
[10] *Ibid*.

[13] Ms. Rer is not entitled to copyright protection in any of her claimed works because: (1) the Unfiltered Photos are "mere copies" of Bestmont's architectural works that required no skill and judgment to make; (2) Ms. Rer produced the Filtered Photos by mechanically applying common filters to the Unfiltered Photos; and (3) Ms. Rer wrongfully claims Bestmont's exercise of skill and judgment in the Façade Collection as her own.

### 1. The Unfiltered Photos are not protected by copyright

[14] The Court of Appeal correctly held that Ms. Rer's Unfiltered Photos are not original because they are "mere copies" of Bestmont's architectural works that Ms. Rer reproduced by repeating a "purely mechanical exercise."[11] Ms. Rer's formulaic photography method required no skill or judgement to implement. With just a click of a button, she captured each of the Unfiltered Photos in which she now claims copyright. There is no copyright in the Unfiltered Photos because: (a) they are mere copies of Bestmont's architectural design; (b) copying a design requires no skill or judgment; and (c) the American doctrine of derivative works does not confer copyright on the Unfiltered Photos distinct from that of Bestmont's hotel façades.

#### *a. The Unfiltered Photos are mere copies*

[15] The Unfiltered Photos are copies of Bestmont's architecture, and copyright does not protect a work that is "a mere copy of another work."[12] Accepting Ms. Rer's claim that her works are original, and thereby protected by copyright, is no different than accepting that an exact photocopy of a copyrighted work could be original.

[16] A copy is not an original work, no matter the degree of skill and judgment that went into creating it. The Federal Court of Appeal, citing *Interlego*, held that "skill, labour or judgment

[11] *CCH*, *supra* note 9 at para 16; *Appeal*, *supra* note 6 at para 5.
[12] *CCH*, *supra* note 9 at para 16.

merely in the process of copying cannot confer originality."[13] The SCC in *CCH* affirmed this sentiment in holding that an original work must be one that "originates from an author and is not copied from another work."[14] No matter how much effort Ms. Rer put into copying Bestmont's designs, her actions did not result in an original work because the final product was a photographic copy of Bestmont's hotel design and marquee. Similarly, in *Bridgeman Art Library v Corel Corp*, the Plaintiff "labored to create 'slavish copies' of public domain works of art."[15] These photographic copies were not protected by copyright because "a photograph which is no more than a copy of the work of another as exact as science and technology permit lacks originality."[16]

[17] The Court of Appeal correctly held that Bestmont cannot infringe by reproducing its own copyrighted architecture "in any medium including through reproduction of the [Unoriginal Photos]."[17] Although paragraph 32.2(1)(b) of the *Act* exempts architectural works from being infringed by photographic reproductions, copyright transcends form, protecting Bestmont's right to reproduce its own work "in any material form whatsoever."[18] Denying Bestmont this right would contravene one of the most basic protections afforded by the *Act* – protection of the author's right to use its own creation.

[18] Relying on the architectural works exemption to find copyright in the Unfiltered Photos goes beyond the language in the statute. Paragraph 32.2(1)(b) only states that "it is not an infringement of copyright" to reproduce an architectural work in a photo.[19] The architectural works exemption is only a defence. It "does not confer any right to assert copyright against others."[20] Nor

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[13] *CCH Canadian Ltd v Law Society of Upper Canada*, 2002 FCA 187 at para 31 citing *Interlego AG v Tyco Industries Inc & Ors (Hong Kong)*, [1988] 3 All ER 949 at 970, [1988] 3 WLR 678 (cited to All ER) [*Interlego*].
[14] *CCH*, *supra* note 9 at para 25.
[15] *Bridgeman Art Library Ltd v Corel Corp*, 25 F Supp 2d 421 at para 40, 36 F Supp. 2d 191 (SDNY 1999).
[16] *Ibid*.
[17] *Appeal*, *supra* note 6 at para 2.
[18] *Act*, *supra* note 1 ss 3(1), 32.2(1)(b).
[19] *Ibid*.
[20] *Appeal*, *supra* note 6 at para 3.

does it go so far as to strip Bestmont of its right to set conditions on how photos of its architecture are used. In *Théberge v Galerie d'Art du Petit Champlain*, the SCC affirmed an author's right to "set conditions and exact a price for [society's] consumption of [his or her work]."[21] Additionally, paragraph 32.2(1)(b) is an exception to rights otherwise provided by the *Act*. Therefore, it should be interpreted restrictively to avoid chipping away at copyright further than Parliament intended.[22]

***b. Ms. Rer exercised no skill and judgment beyond that used to copy***

[19] Any skill and judgment Ms. Rer used to create the Unfiltered Photos was to copy Bestmont's work. For skill and judgment to contribute to a finding of originality, that skill and judgment must be directed toward more than simply copying another work. The SCC's definition of "original" includes the terms "not derivative or dependant, first-hand, not imitative, [and] novel in character or style."[23] By copying the very features for which Bestmont's hotels are famous, Ms. Rer created a work that was derivative, second-hand, imitative, and lacking in novelty. If skill and judgment used to copy a work is sufficient to make the copied work original, even photocopies could be considered original works.

[20] Choosing to take the Unfiltered Photos from a distance of 100 feet is not enough to confer originality in the Unfiltered Photos because, in making this decision, Ms. Rer was deciding how best to copy Bestmont's design. As stated in *Interlego*, "copying, *per se*, however much skill or labour may be devoted to the process," cannot make a work original.[24] Ms. Rer chose to take her photos from 100 feet to "allow the marquee to be prominently featured…while still depicting the

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[21] SCC 34 at para 119 [*Théberge*] citing Jonathan Herman, "Moral Rights and Canadian Copyright Reform: The Impact on Motion Picture Creators" (1990) 20:2 RD Université Sherbrooke 407 at 411.
[22] Mathieu Devinat, Pierre-André Côté & Stéphane Beaulac, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 535–36.
[23] *CCH*, *supra* note 9 at para 18 citing H W Fowler, ed, Concise Oxford Dictionary of Current English, 7th ed (Oxford University Press, 1982) sub verbo "original".
[24] *Interlego*, *supra* note 13 at 971.

unique design features of each hotel's façade."[25] She did not incorporate the cityscape or skyline into her photograph. Instead, she created optimally accurate photographic replicas of Bestmont's design. Therefore, the Appellant is misguided by relying on *Ateliers Tango Argentin c Festival d'Espagne et d'Amérique Latine* to assert that Ms. Rer may have exercised skill and judgment by choosing "angles of view, lighting arrangements, and pose of the subject."[26] There is no evidence that Ms. Rer made any such choices. Further, the test for originality from this case is no longer reliable since it was supplanted by the test for originality in *CCH*.

### *c. The American doctrine of derivative works is not applicable in Canada*

[21] The American doctrine of derivative works does not apply to the Unfiltered Photos. The Court of Appeal correctly held that the doctrine of derivative works is a "foreign principal that has but a toehold in Canada and should not be applied."[27] In *Théberge*, the SCC held that if a Plaintiff hopes to enlarge the protection afforded by the *Act* by using "the more expansive U.S. definition of 'derivative works,'" then "his remedy lies in Parliament, not the courts."[28] Therefore, adopting the broad American doctrine of derivative works would be too great a departure from the *Act*.

[22] Alternatively, should this Court find that the doctrine of derivative works applies, Ms. Rer's copyright in her Unfiltered Photos would not supersede Bestmont's copyright in its underlying work. Ms. Rer should not be able to exploit Bestmont's work such that Bestmont may only derive a limited benefit from its original design. Forcing Bestmont to pay for works that are a mere reproduction of its own copyrighted underlying work would upset the balance copyright strikes between "promoting the public interest in the encouragement and dissemination of works

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[25] *Trial*, *supra* note 2 at para 4.
[26] *Factum of the Appellant, Team 7A* at para 16 [*Appellant Factum*] citing *Ateliers Tango Argentin c Festival d'Espagne et d'Amerique Latine*, [1997] RJQ 3030 at para 39, 84 CPR (3d) 56 (QCCS).
[27] *Appeal*, *supra* note 6 at para 3.
[28] *Théberge*, *supra* note 21 at paras 72, 73*; Act*, *supra* note 1 s 3(1).

of the arts and intellect and obtaining a just reward for the creator."[29]

**2. Applying a common filter to a photo is a mechanical exercise**

[23] Adding a "readily available filter" to a photo does not constitute an exercise of skill and judgment that gives rise to originality because it is a "merely mechanical exercise."[30] Like capturing an unoriginal photo, adding a filter requires only a click of a button. Further, as the Court of Appeal found, Ms. Rer mechanically repeated the application of each filter to each Unfiltered Photo to create the Filtered Photos.[31] Since this mechanical process did not require any exercise of skill or judgment, this Court should not find originality in any of the individual Filtered Photos.

[24] In *Goldi Productions Ltd et al v Bunch*, an Ontario Court held that using a computer program to enhance a photo was a "'purely mechanical process' within the meaning of [*CCH*]," and therefore, did not give rise to a finding of originality.[32] Similarly, Ms. Rer used a computer program to enhance the Filtered Photos in which she now claims copyright. Like changing the font of a piece of writing, adding a filter is an act "too trivial to merit copyright protection."[33] Thus, Ms. Rer's Filtered Photos are not protected by copyright distinct from any copyright in the Unfiltered Photos as they are, at most, mere reproductions of the Unfiltered Photos.

**3. Ms. Rer does not have copyright in the Façade Collection**

[25] Ms. Rer did not exercise any skill and judgment in selecting or arranging the Façade Collection. For copyright to subsist in a compilation, it must be "an original work that is created as a result of selection or arrangement."[34] Ms. Rer did not select anything because she based her complete collection of photos on Bestmont's collection of hotels and chose to use only popular

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[29] *Théberge*, *supra* note 21 at para 30.
[30] *Appeal*, *supra* note 6 at para 5; *CCH*, *supra* note 9 at para 16.
[31] *Appeal*, *supra* note 6 at para 5.
[32] (1 August 2018), Brampton 15-5800 (Ont Sm Cl Ct) at para 10 [*Goldi*] citing *CCH*, *supra* note 9 at para 22.
[33] *CCH*, *supra* note 9 at para 16.
[34] *Robertson v Thomson Corp*, 2006 SCC 43 at para 37 [*Robertson*] citing *Act*, *supra* note 1 s 2.

filters. Ms. Rer also did not arrange her photos. *Robertson*, citing Chief Justice McLachlan, held that "a compilation takes existing material and casts it in different form."[35] By failing to arrange the photos in the Façade Collection, Ms. Rer did not cast them in a different form.

[26] Ms. Rer did nothing to select her photos. According to the Trial Judge, Ms. Rer took one photo of each hotel and then applied four filters to every one of those photos.[36] Every photo she took and filtered became part of the Façade Collection. Selecting all of something is not selection at all. Further, all filters selected by Ms. Rer were so popular that they existed on more than one photo-editing program. The filters she chose were so obvious and commonplace that choosing them could not have required any skill and judgment.

[27] Obvious selections, such as Ms. Rer's, are not sufficiently original to warrant copyright protection. In *Feist Publications, Inc v Rural Telephone Service Company, Inc*, the Defendant's choice of what information to include in their telephone directory (*i.e.*, name, town and telephone number) did not make the directory original because it "could not [have been] more obvious."[37] Ms. Rer's choice was also obvious in that she used every Bestmont hotel and only popular filters to make the Façade Collection.

[28] Not only are popular filters an obvious choice, using such filters is standard practice in Ms. Rer's industry. In *Tele-Direct (Publications) Inc v American Business Information, Inc*, the Plaintiff's brochure was not protected by copyright because the Plaintiff "arranged its information…according to accepted, commonplace standards of selection in the industry."[38] Making an obvious selection of filters that conforms to an industry standard does not require an

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[35] *Robertson*, *supra* note 34 at para 36 citing Slumber-*Magic Adjustable Bed v Sleep-King Adjustable Bed*, [1984] BCWLD 3079 at 84, [1984] BCJ No 3054.
[36] *Trial*, *supra* note 2 at para 5.
[37] *Feist Publications, Inc v Rural Telephone Service Company, Inc*, 499 US 340 at 341, 111 S Ct 1282.
[38] *Tele-Direct (Publications) Inc v American Business Information Inc*, [1998] 2 FC 22 at para 6, 154 DLR (4th) 328.

exercise of skill and judgment sufficient to confer originality.

## B. Alternatively, the Hotel Photos did not infringe Ms. Rer's copyright

[29] Copyright infringement is only found where: (1) there is "substantial similarity between the works in question such that the allegedly infringing work could be considered a copy or reproduction of the protected work"; and (2) the defendant "had access to the work protected by copyright."[39] Bestmont concedes that it had access to Ms. Rer's works. However, the Hotel Photos did not copy or reproduce any of Ms. Rer's works.

[30] If copyright subsists in any of Ms. Rer's works, Bestmont's did not infringe because (1) Bestmont should be permitted to reproduce its own work; (2) when Bestmont applied filters to create the Hotel Photos, it was using a common technique not protected by copyright; and (3) Bestmont's Hotel Photos are not substantially similar to the Façade Collection.

### 1. Bestmont should be entitled to use its own copyrighted work

[31] Finding that Bestmont's use of photos of its own intellectual property is infringement will limit what Bestmont can do with its own architectural work in the future. It limits Bestmont's control over who can use photos of its architectural work, even though these photos are copies of Bestmont's original architectural work. Further, the Appellant alleges that Bestmont infringed the Unfiltered Photos by adding filters "in an attempt to pass off a reproduced work as novel by making alterations to the form of the original."[40] Bestmont contends that this is an apt description of what Ms. Rer did when she attempted to sell photographic copies of Bestmont's architectural works.

### 2. Using filters is a common technique not protected by copyright

[32] Bestmont's use of a common photographic technique in applying filters to its photos does not constitute copyright infringement because using filters – especially popular filters – is a

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[39] *Phillip Morris Products SA v Marlboro Canada Ltd*, 2010 FC 1099 at para 315.
[40] *Appellant Factum*, *supra* note 26 at para 35.

common technique not subject to copyright protection. In *Rains v Molea*, the Ontario Superior Court held that the use of "common, long-established artistic techniques" by both parties in their paintings of crumpled paper was sufficient to negate a finding of infringement.[41] Bestmont's use of filters similar to those used by Ms. Rer should not result in a finding of copyright infringement because using photo filters is also a "common, long-standing" photo-editing technique.[42]

[33] The Appellant incorrectly asserted that the photos featured in Bestmont's Hotel Photos are "essentially identical" to those featured in the Façade Collection.[43] Rather, Bestmont used filtered images that were "not identical to Ms. Rer's images and had visible differences."[44]

**3. The Hotel Photos are not substantially similar to the Façade Collection**

[34] The originality in the Hotel Photos resulted from Bestmont's use of skill and judgement to curate the hotels that are the subjects of those photos. Any originality in Bestmont's Hotel Photos did not result from a substantial part of the originality in Ms. Rer's Façade Collection.

[35] A compilation is original when an author uses skill and judgement to select or arrange the components of that compilation.[45] Bestmont's selection included 70 photos which were not part of the Façade Collection. Even if copyright subsists in the Façade Collection, Bestmont did not reproduce its originality because Bestmont's selection and arrangement of photos was distinct from Ms. Rer's selection and arrangement of photos. Further, Bestmont used a different photo-editing program with filters that were visually distinct from those chosen by Ms. Rer.

## C. <u>Statutory damages should be minimal</u>

[36] The Court of Appeal correctly held that awarding Ms. Rer $20,000 per infringement is

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[41] *Rains v Molea*, 2013 ONSC 5016 at para 30.
[42] *Ibid*.
[43] *Appellant Factum*, *supra* note 26 at para 38.
[44] *Clarification Questions*, *supra* note 4 at 3.
[45] *Robertson*, *supra* note 34 at para 37; *CCH*, *supra* note 9 at para 16.

"grossly out of proportion" to Bestmont's dealing.[46] An award of $100 is just because: (1) Bestmont used the Hotel Photos for a non-commercial purpose; (2) Bestmont acted honestly; and (3) a minimal damages award is proportional to Bestmont's dealing.

**1. Bestmont used the photos for a non-commercial purpose**

[37] Bestmont's dealing was non-commercial because Bestmont did not sell the Hotel Photos or use them in advertising material. The Court of Appeal correctly stated that "[t]here was no evidence Bestmont's use of the photographs generated any additional revenue or business advantage."[47] Accordingly, any damages awarded must be on the lower scale.

[38] Subsection 38.1(1) of the *Act* gives judges discretion to award a quantum that is just and proportionate to the infringement.[48] If the infringement is for a commercial purpose, damages range from $500 to $20,000 per infringement. If the infringement is for a non-commercial purpose, damages range from $100 to $5,000 for all works infringed. Since the *Act* does not define "commercial" or "non-commercial", a dispute persists regarding their meanings. Considering text, context, and purpose of the provision resolves this dispute.[49] Here, text, context, and purpose converge on one conclusion: "commercial purpose" describes only for-profit dealings and advertising. Therefore, given the dichotomous nature of subsection 38.1(1), anything that does not fall under "commercial purpose," must automatically be "non-commercial." Since Bestmont did not sell the Hotel Photos or use them in advertising materials, its conduct was non-commercial.

***a. Text***

[39] Parliament's intent is assumed to be "the meaning that spontaneously comes to the mind

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[46] *Appeal*, *supra* note 6 at para 8.
[47] *Ibid* at para 7.
[48] *Act*, *supra* note 1 s 38.1(1).
[49] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 26 at para 21, 154 DLR (4th) 193.

of a competent reader."[50] When an entity acts with commercial purpose, its goal is to increase profit. The grammatical and ordinary meaning of "commercial" affirms this. Black's Law Dictionary defines "commercial" as "…relating to, or involving the ability of a product or business to make a profit."[51] Therefore, commercial infringement must only include copyright use that is meant to generate profit. Given that Bestmont displayed the Hotel Photos rather than selling them or using them in advertising materials, Bestmont neither made nor intended to make a profit. [52]

***b. Context***

[40] The textual, profit-driven meaning of "commercial purpose" is consistent with Parliament's use of "commercial" elsewhere in the *Act*. Specifically, the *Act* defines "commercially available" as "available on the Canadian market within a reasonable time and for a reasonable price."[53] Commercial availability thus means available in the marketplace for purchase. Throughout the *Act*, "commercial" is used to signal engaging in the sale of goods or services with a motive to profit. Bestmont lacked this motive, thus its dealing was non-commercial.

***c. Purpose***

[41] Parliament amended the *Act*, adding a distinction between commercial and non-commercial purpose, to "fous[] on those who engage[d] in [copyright infringement] for profit."[54] Courts have interpreted the commercial purposes provision in accordance with Parliament's intent and found commercial purpose where: defendants directly profited from the sale of counterfeit

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[50] Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82 Can Bar Rev 51 at 59.
[51] Brian A Garner, ed, Black's Law Dictionary, 11th ed (Thomson Reuters, 2019) sub verbo "commercial".
[52] Additionally, in crafting harsher remedies for commercial infringement, Parliament wanted to focus on the purpose of the infringement, not the nature of the infringing entity. As such, for-profit corporations may infringe for non-commercial purpose when their dealing does not involve the sale of infringing goods or marketing with infringing works. See *Parent c Gagnon,* 2016 QCCQ 3774 as an example.
[53] *Act, supra* note 1 s 2.
[54] "Bill C-11, An Act to amend the Copyright Act", 2nd reading, House of Commons Debates, 41-1, No 31 (18 October 2011) at 1040 (Hon Christian Paradis); "Bill C-11, An Act to amend the Copyright Act", 2nd reading, House of Commons Debates, 41-1, No 78 (10 February 2012) at 1045 (Mr Peter Braid).

products,[55] and the defendants used the copyrighted work as advertising for future gain.[56] Specifically, courts have interpreted commercial purpose as profiting from the sale of infringing goods. For example, in *Wang*, the Defendants infringed for a commercial purpose because they sold counterfeit purses bearing the Plaintiff's monogram.[57] Bestmont's conduct is distinguished because it did not sell or profit from the Hotel Photos.

[42] Bestmont also did not use any copyrighted work in advertising materials. For example, in *Mejia*, the Trial Judge held that the Defendant's infringement was for a commercial purpose because the Defendant used the Plaintiff's photos in online marketing materials to attract prospective students to its teaching program.[58] Unlike *Mejia*, Bestmont did not use the Hotel Photos as advertising material. The Hotel Photos were not used on a website, in a social media post, or in an advertising campaign. Rather, Bestmont hung the Hotel Photos in the hallways of its hotels; a secluded place only accessible to guests who already decided on their stay.

[43] The Appellant seeks to characterize Bestmont's dealing with the Hotel Photos as a "marketing tool," however, the Appellant misconstrues the Trial Judge's finding of fact. [59] Instead, the Trial Judge found that "Bestmont decided to use the Façade [Collection], not in its marketing materials, but instead to decorate the interior of its hotels."[60] Displaying photos as decoration is not "marketing material," and there is no evidence that the Hotel Photos "encouraged both word-of-mouth-referrals and repeated stays."[61] Given that Bestmont neither sold the Hotel Photos nor used them in advertising materials, its conduct was for a non-commercial purpose. Thus, damages

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[55] *Louis Vuitton Malletier SA v Wang*, 2019 FC 1389 at para 196–98 [*Wang*]; *Microsoft Corp v Liu*, 2016 FC 950 at para 21[*Liu*]; *Adobe Systems Incorporated et al v Thompson*, 2012 FC 1219 at para 5 [*Adobe Systems*].
[56] *Mejia v LaSalle Collège International Vancouver Inc*, 2014 BCSC 1559 at para 194 [*Mejia*]. See also *Young v Thakur*, 2019 FC 835 at para 45.
[57] *Wang*, *supra* note 55 at paras 194–96.
[58] *Mejia*, *supra* note 56 at 177–78, 215.
[59] *Appellant factum*, *supra* note 26 at para 41.
[60] *Trial*, *supra* note 2 at para 8.
[61] *Appellant Factum*, *supra* note 26 at para 41.

must be calculated based on the alleged infringements collectively, rather than individually.

**2. Bestmont acted honestly**

[44] Subsection 38.1(5) of the *Act* gives judges discretion to tailor statutory damages to ensure that the quantum is just.[62] Here, the Trial Judge awarded a sum "grossly out of proportion" to the alleged conduct.[63] Instead, $100 for all works is just because Bestmont: (a) acted in good faith; (b) behaved appropriately before and during the proceedings; (c) does not need to be deterred; and (d) would otherwise suffer from disproportionately high damages.

***a. Bestmont acted in good faith***

[45] The Court of Appeal correctly held that "Bestmont genuinely believed it had the right to reproduce the photographs of its own hotel."[64] Courts have found bad faith where the infringement was prolonged, deliberate, and undisputedly for a commercial purpose.[65] Bestmont's dealing satisfies none of these criteria. For example, unlike in *Bell Canada*, Bestmont did not "knowingly and deliberately" infringe Ms. Rer's copyright or cause her significant financial loss.[66] Instead, Bestmont's dealings were genuine because, as the underlying copyright owner of the hotel design and marquee, it honestly believed Ms. Rer infringed its copyright.

[46] A belief that one is acting legally does not amount to bad faith. In *Trader Corp v CarGurus*, the Defendant was an American company, operating a car sales website.[67] Upon entering the Canadian market, the Defendant continued acquiring car photos the same way it had in America, which unintentionally infringed the Plaintiff's copyright. The Trial Judge held that the Defendant's belief that they were operating legally negated a finding of bad faith. Like the Defendant in *Trader*,

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[62] *Act*, *supra* note 1 s 38.1(5).
[63] *Appeal*, *supra* note 6 at para 8.
[64] *Ibid*.
[65] *Bell Canada v L3D Distributing Inc*, 2021 FC 832 at paras 100–02 [*Bell Canada*]; *Liu*, *supra* note 55 at para 22; *Wang*, *supra* note 55 at paras 14, 196, 198.
[66] *Bell Canada*, *supra* note 65 at paras 100–03; *Appeal*, *supra* note 6 at para 8.
[67] 2017 ONSC 1847 at paras 60–62, 67 [*Trader*].

Bestmont "genuinely believed" it could legally reproduce the Façade Collection.[68]

***b. Bestmont behaved appropriately before and during the proceedings***

[47] Bestmont's dealing is contrary to the inappropriate behaviour found in the jurisprudence. Courts have found inappropriate conduct where the defendant: ignored cease-and-desist letters;[69] repeatedly infringed copyrighted products;[70] intentionally failed to comply with court orders;[71] or used concealment tactics.[72] Bestmont did none of these things. Additionally, the Appellant incorrectly states that Bestmont's dealing was persistent like that of the Defendants in *Microsoft* or *Rundle.*[73] Rather, Bestmont behaved appropriately throughout proceedings, has not ignored cease-and-desist letters, and removed the Hotel Photos prior to trial as a sign of good faith.[74]

***c. Bestmont's conduct does not need deterrence***

[48] The Appellant wrongly asserts that Bestmont must be deterred because of its corporate status.[75] In fact, successful corporations are often victims of copyright infringement at the hands of individuals who attempt to take advantage of businesses' success.[76] For example, in *Louis Vuitton Malletier SA v Yang,* the Defendant sold knockoffs of the Plaintiff corporation's merchandise to profit from the luxury brand's popularity.[77] Like the Defendant in *Yang,* Ms. Rer tried to profit from Bestmont's success, as exemplified by the Trial Judge's finding that "Bestmont has built a strong reputation for high-end hotels located in prime destinations" across Canada.[78]

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[68] *Appeal*, *supra* note 6 at para 8.
[69] *Liu*, *supra* note 55 at paras 2, 29–30.
[70] *Twentieth Century Fox Film Corp v Hernandez*, 2013 CarswellNat 6160 (FC) at para 1 [*Hernandez*]; *Attorney General of Canada v Rundle*, 2014 ONSC 2136 at para 20 [*Rundle*]; *Microsoft Corporation v 1276916 Ontario* 2009 FC 849 paras 2–3 [*Microsoft*].
[71] *Telewizja Polsat SA v Radiopol Inc*, 2006 FC 584 at para 6.
[72] *Collett v Northland Art Company Canada Inc*, 2018 FC 269 at para 73 [*Collett*]; *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2020 FC 794 at para 48 [*Rallysport*].
[73] *Microsoft*, *supra* note 70 at paras 2–3; *Rundle*, *supra* note 70 at para 20.
[74] *Trial*, *supra* note 2 at para 10.
[75] *Appellant Factum*, *supra* note 26 at para 46.
[76] See *Bell Canada*, *supra* note 65 and *Wang*, *supra* note 55 as examples.
[77] 2007 FC 1179 at para 25 [*Yang*].
[78] *Trial*, *supra* note 2 at para 2.

[49] Deterrence should focus on preventing recurring copyright infringement, rather than focusing on corporate status.[79] Since there is no evidence Bestmont infringed copyright in the past, and the alleged infringement is an honest belief, Bestmont's conduct does not require deterrence.

***d. Bestmont would otherwise suffer from a disproportionately high damages award***

[50] Awarding Ms. Rer $1,500,000 in statutory damages is grossly disproportionate because the quantum does not reflect Bestmont's non-commercial dealing or the lack of impact the alleged infringement had on Ms. Rer. Further, $1,500,000 is an onerous sum that would cause hardship to anyone, including Bestmont. The sum is especially egregious considering that Bestmont is being punished for using its own intellectual property. Additionally, Ms. Rer suffered no identifiable loss because there is no evidence that anyone besides Bestmont would purchase the Façade Collection.

**3. A minimal damages award is proportional to Bestmont's dealing**

[51] If this Court finds that Bestmont's dealing is for a commercial purpose, statutory damages should be reduced under subsection 38.1(3) of the *Act* because: (a) the Façade Collection was in a single medium; and (b) awarding even $500 per infringement would unjustly enrich Ms. Rer. Instead, $100 in damages is more appropriate.

***a. The Façade Collection was in a single medium***

[52] Subsection 38.1(3) of the *Act* lets judges reduce commercial damages below the statutory minimum when: (a) "there is more than one work…in a single medium," and (b) when even the minimum amount would result in a total award that is grossly disproportionate.[80] Courts have broadly interpreted "single medium" to include newspapers, anthologies, and websites.[81] Ms. Rer

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[79] *Nintendo of America Inc v King*, 2017 FC 246 at para 163 [*Nintendo*]; *Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc*, 2011 FC 776 at paras 158–59.
[80] *Act*, *supra* note 1 s 38.1(3).
[81] *Nintendo*, supra note 79 at para 148; *Rallysport*, *supra* note 72 at para 3; *Trader*, *supra* note 67 at para 57; *Trial*, *supra* note 2 at para 6.

provided her photos on a portable drive.[82] While not a website, a portable drive has the same features of a website once inserted into a computer because it electronically displays multiple photos in the same location. Thus, the Façade Collection, Filtered Photos, and Unfiltered Photos are more than one work (photograph) in a single medium (portable device).

***b. $500 per infringement would unjustly enrich Ms. Rer***

[53] Awarding Ms. Rer $500 per photo would be "grossly out of proportion to the infringement."[83] In *Ritchie v Sawmill Creek Golf & Country Club Ltd*, the Trial Judge held that an advertising campaign of 100 photos taken by a professional photographer would cost about $1,600.[84] Even accounting for inflation, for Bestmont to pay $500 per photo of its own intellectual property to an amateur photographer is grossly disproportionate to market value and would unjustly enrich Ms. Rer. A minimal award of $100 for all infringements is more appropriate.

**D. <u>Ms. Rer is not entitled to punitive damages</u>**

[54] If Bestmont infringed Ms. Rer's copyright, it should not be punished for honestly believing it could display the Hotel Photos. In calculating quantum, the Trial Judge awarded Ms. Rer "$500,000 to punish Bestmont" under the guise of statutory damages.[85] The Appellant incorrectly states that Justice Lodge awarded $500,000 as punitive damages.[86] The award must first be assessed as statutory and then punitive. Based on either classification, Ms. Rer is not entitled to $500,000 because: (1) statutory damages are compensatory, not punitive; (2) if the award is punitive, Ms. Rer never pled punitive damages; and (3) if specific pleadings are not necessary Bestmont's conduct is not "malicious, oppressive and high-handed."[87]

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[82] *Clarification Questions*, *supra* note 4 at 3.
[83] *Appeal*, *supra* note 6 at para 8.
[84] *Ritchie v Sawmill Creek Golf & Country Club Ltd*, [2003] OJ No 3144 (QL) at para 47.
[85] *Trial*, *supra* note 2 at para 20 [emphasis added].
[86] *Appellant Factum*, *supra* note 26 at para 10.
[87] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 196, 126 DLR (4th) 129 [*Hill*].

**1. Statutory damages are compensatory, not punitive**

[55] The Court of Appeal correctly held that the Trial Judge erroneously conflated statutory and punitive damages.[88] Statutory damages intend to compensate the plaintiff even if lost profit is difficult to prove.[89] Judges do not have unfettered discretion to award statutory damages as a tool to punish defendants' conduct.[90] Therefore, statutory damages cannot be used to punish Bestmont.

[56] Subsection 38.1(1) of the *Act* also explicitly caps the maximum commercial infringement at $20,000 per work infringed. While other sections of the *Act* allow trial judges to minimize commercial damages, such discretion is not available to raise the statutory maximum. The Trial Judge could not award Ms. Rer an additional $500,000 under statutory damages because she already received the maximum quantum allowable – $20,000 per infringement.

**2. Ms. Rer never pled punitive damages**

[57] Even if the $500,000 is classified as punitive, Ms. Rer is not entitled to the award. The Court of Appeal correctly held that subsection 38.1(7) of the *Act* did not give the Trial Judge discretion to award punitive damages when none were pled.[91] Rather, subsection 38.1(7) allows parties to seek punitive damages "in addition to…statutory damages."[92] Therefore, punitive damages must be pled.[93] In *Whiten v Pilot Insurance Co*, the SCC held that awarding punitive damages absent any pleadings overlooks the basic tenet of our justice system that defendants must know their scope of jeopardy so they can respond to it.[94] The Appellant's reliance on *Malton v Attia* to argue that it is sufficient for the Defendant not to be surprised by punitive damages, is

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[88] *Appeal*, *supra* note 6 at para 8.
[89] David Vaver, *Copyright Law* (Thomson Reuters, 2000) at 271.
[90] David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (Toronto: Irwin Law, 2011) at 644.
[91] *Appeal*, *supra* note 6 at para 25.
[92] *Rallysport*, *supra* note 72 at para 48.
[93] *Federal Court Rules*, SOR 98-106 s 182(a).
[94] 2002 SCC 18 at para 86 [*Whiten*]. See also *Merck & Co v Apotex Inc*, 2006 FCA 323 at para 148 affirming that Rule 182 of the *Federal Court Rules* require specific pleadings.

unfounded.[95] While the Trial Judge in *Malton* awarded punitive damages absent any pleadings, the decision was overturned on appeal precisely because the Trial Judge amended the motion to add punitive damages, "thereby depriving the appellants of an adequate opportunity to respond."[96] Similarly, Ms. Rer is not entitled to punitive damages since none were pled.

**3. Bestmont's conduct is not malicious, oppressive and high-handed**

[58] Alternatively, the Court of Appeal correctly held that Bestmont's actions are not indicative of the reprehensible conduct punishable by punitive damages.[97] Bestmont's conduct is not "so malicious, oppressive and high-handed that it offends the court's sense of decency."[98]

[59] As the underlying owners of copyright in the hotel design and marquee, Bestmont genuinely believed it owned copyright in the Façade Collection.[99] Additionally, Bestmont's conduct is distinguished from the cases relied upon by the Appellant. In both *Rallysport* and *Collett*, the Defendants knowingly and deliberately infringed the Plaintiffs' copyrights and used evasive techniques to avoid litigation.[100] In fact, Bestmont complied with court orders and even removed the Hotel Photos prior to start of trial.[101] Bestmont does not deserve to be punished for using photos of its own intellectual property.

## PART V: ORDER REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of January 2022.

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Counsel for the Respondent
Team No 6R

[95] 2015 ABQB 135 at para 693 [*Malton*] citing *Whiten*, *supra* note 94, Binnie J, dissenting at para 88.
[96] *Malton v Attia*, 2016 ABCA 130 at para 56.
[97] *Appeal*, *supra* note 6 at para 8.
[98] *Hill*, *supra* note 87 at para 196.
[99] *Appeal*, *supra* note 6 at para 8.
[100] *Rallysport*, *supra* note 72 at para 49; *Collett*, *supra* note 72 at para 73.
[101] *Trial*, *supra* note 2 at para 10.

## PART VI: TABLE OF AUTHORITIES

| AUTHORITY | PINPOINT |
|---|---|
| **Legislation** | |
| *Copyright Act*, RSC 1985 c. C-42 | 2, 3(1), 32.2(1)(b), 38.1(1), 38.1(3), 38.1(5) 38.1(7) |
| *Federal Court Rules*, SOR 98-106 | 182 |
| **Jurisprudence** | |
| *Adobe Systems Incorporated et al v Thompson*, 2012 FC 1219 | 5 |
| *Ateliers Tango Argentin c Festival d'Espagne et d'Amerique Latine*, [1997] RJQ 3030, 84 CPR (3d) 56 (QCCS). | 39 |
| *Attorney General of Canada v Rundle*, 2014 ONSC 2136 | 20 |
| *Bell Canada v L3D Distributing Inc*, 2021 FC 832 | 100, 101, 102, 103 |
| *Bestmont v Wanda Rer*, 2021 CAIP 333 | 2, 3, 5, 6, 7, 8, 9, 10, 16, 25 |
| *Bridgeman Art Library Ltd v Corel Corp*, 25 F Supp 2d 421, 36 F Supp. 2d 191 (SDNY 1999) | 40 |
| *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 | 16, 18, 22, 25 |
| *CCH Canadian Ltd v Law Society of Upper Canada*, 2002 FCA 187 | 25 |
| *Collett v Northland Art Company Canada Inc*, 2018 FC 269 | 73 |
| *Feist Publications Inc v Rural Telephone Service Company Inc*, 499 US 340, 111 S Ct 1282 | 341 |
| *Goldi Productions Ltd et al v Bunch*, (1 August 2018), Brampton 15-5800 (Ont Sm Cl Ct) | 10 |
| *Hill v Church of Scientology*, [1995] 2 SCR 1130, 126 DLR (4th) 129 | 196 |
| *Interlego AG v Tyco Industries Inc & Ors (Hong Kong)*, [1988] 3 All ER 949, [1988] 3 WLR 678 | 970, 971 |
| *Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc*, 2011 FC 776 | 158, 159 |
| *Louis Vuitton Malletier SA v Wang*, 2019 FC 1389 | 14, 115, 196, 198 |
| *Louis Vuitton Malletier SA v Yang*, 2007 FC 1179 | 25 |
| *Malton v Attia*, 2015 ABQB 135 | 693 |

## PART VII: APPENDIX A

| **Copyright Act** | |
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| **Definitions**<br><br>**2** In this Act,<br><br>**compilation** means<br>**(a)** a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or<br>**(b)** a work resulting from the selection or arrangement of data; (compilation)<br><br>…<br><br>**Commercially available** means, in relation to a work or other subject-matter,<br><br>(a) available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, or<br>(b) for which a licence to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort; (accessible sur le marché) | **Définitions**<br><br>**2** Les définitions qui suivent s'appliquent à la présente loi.<br><br>**compilation** Les œuvres résultant du choix ou de l'arrangement de tout ou partie d'œuvres littéraires, dramatiques, musicales ou artistiques ou de données. (compilation)<br><br>…<br><br>**distributeur exclusif** S'entend, en ce qui concerne un livre, de toute personne qui remplit les conditions suivantes:<br><br>a) le titulaire du droit d'auteur sur le livre au Canada ou le titulaire d'une licence exclusive au Canada s'y rapportant lui a accordé, avant ou après l'entrée en vigueur de la présente définition, par écrit, la qualité d'unique distributeur pour tout ou partie du Canada ou d'unique distributeur pour un secteur du marché pour tout ou partie du Canada;<br>b) elle répond aux critères fixés par règlement pris en vertu de l'article 2.6. |
| **Copyright in works**<br><br>**3 (1)** For the purposes of this Act, **copyright**, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever… | **Droit d'auteur sur l'œuvre**<br><br>**3 (1)** Le droit d'auteur sur l'œuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'œuvre, sous une forme matérielle quelconque… |
| **Permitted acts**<br><br>It is not an infringement of copyright | **Actes licites**<br><br>**32.2 (1)** Ne constituent pas des violations du droit d'auteur : |

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| **(b)** for any person to reproduce, in a painting, drawing, engraving, photograph or cinematographic work<br><br>**(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 | **b)** la reproduction dans une peinture, un dessin, une gravure, une photographie ou une œuvre cinématographique :<br><br>**(ii)** d'une sculpture ou d'une œuvre artistique due à des artisans, ou d'un moule ou modèle de celles-ci, érigées en permanence sur une place publique ou dans un édifice public |
| **Statutory damages**<br><br>**38.1 (1)** Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally,<br><br>**(a)** in a sum of not less than $500 and not more than $20,000 that the court considers just, with respect to all infringements involved in the proceedings for each work or other subject-matter, if the infringements are for commercial purposes; and<br><br>**(b)** in a sum of not less than $100 and not more than $5,000 that the court considers just, with respect to all infringements involved in the proceedings for all works or other subject-matter, if the infringements are for non-commercial purposes.<br><br>… | **Dommages-intérêts préétablis**<br><br>**38.1 (1)** Sous réserve des autres dispositions du present article, le titulaire du droit d'auteur, en sa qualité de demandeur, peut, avant le jugement ou l'ordonnance qui met fin au litige, choisir de recouvrer, au lieu des dommages-intérêts et des profits visés au paragraphe 35(1), les dommages-intérêts préétablis ci-après pour les violations reprochées en l'instance à un même défendeur ou à plusieurs défendeurs solidairement responsables :<br><br>**a)** dans le cas des violations commises à des fins commerciales, pour toutes les violations — relatives à une œuvre donnée ou à un autre objet donné du droit d'auteur —, des dommages-intérêts dont le montant, d'au moins 500 $ et d'au plus 20 000 $, est déterminé selon ce que le tribunal estime équitable en l'occurrence;<br><br>**b)** dans le cas des violations commises à des fins non commerciales, pour toutes les violations — relatives à toutes les œuvres données ou tous les autres objets donnés du droit d'auteur —, des dommages-intérêts, d'au moins 100 $ et d'au plus 5 000 $, dont le montant est déterminé selon ce que le tribunal estime equitable en l'occurrence.<br><br>… |

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| **Special case**<br><br>**(3)** In awarding statutory damages under paragraph (1)(a) or subsection (2), the court may award, with respect to each work or other subject-matter, a lower amount than $500 or $200, as the case may be, that the court considers just, if<br><br>**(a)** either<br>**(i)** there is more than one work or other subjectmatter in a single medium, or<br>**(ii)** the award relates only to one or more infringements under subsection 27(2.3); and<br><br>**(b)** the awarding of even the minimum amount referred to in that paragraph or that subsection would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement.<br><br>…<br><br>**Factors to consider**<br><br>**(5)** In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including<br><br>**(a)** the good faith or bad faith of the defendant;<br><br>**(b)** the conduct of the parties before and during the proceedings;<br><br>**(c)** the need to deter other infringements of the copyright in question; and<br><br>**(d)** in the case of infringements for non-commercial purposes, the need for an award to be proportionate to the infringements, in consideration of the hardship the award may cause to the defendant, whether the infringement was | **Cas particuliers**<br><br>**(3)** Dans les cas où plus d'une œuvre ou d'un autre objet du droit d'auteur sont incorporés dans un même support matériel ou dans le cas où seule la violation visée au paragraphe 27(2.3) donne ouverture aux dommages-intérêts préétablis, le tribunal peut, selon ce qu'il estime équitable en l'occurrence, réduire, à l'égard de chaque œuvre ou autre objet du droit d'auteur, le montant minimal visé à l'alinéa (1)a) ou au paragraphe (2), selon le cas, s'il est d'avis que même s'il accordait le montant minimal de dommages-intérêts préétablis le montant total de ces dommages-intérêts serait extrêmement disproportionné à la violation.<br><br>…<br><br>**Facteurs**<br><br>**(5)** Lorsqu'il rend une décision relativement aux paragraphes (1) à (4), le tribunal tient compte notamment des facteurs suivants :<br><br>**a)** la bonne ou mauvaise foi du défendeur;<br><br>**b)** le comportement des parties avant l'instance et au cours de celle-ci;<br><br>**c)** la nécessité de créer un effet dissuasif à l'égard de violations éventuelles du droit d'auteur en question;<br><br>**d)** dans le cas d'une violation qui est commise à des fins non commerciales, la nécessité d'octroyer des dommages-intérêts dont le montant soit proportionnel à la violation et tienne compte des difficultés qui en résulteront pour le défendeur, du fait que |

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| for private purposes or not, and the impact of the infringements on the plaintiff. | la violation a été commise à des fins privées ou non et de son effet sur le demandeur. |
| **Federal Court Rules** | |
| **Statements of Claim**<br><br>**Claims to be specified**<br><br>**182** Every statement of claim, counterclaim and third party claim shall specify<br><br>**(a)** the nature of any damages claimed | **Déclarations**<br><br>**Contenu**<br><br>**182** La déclaration, la demande reconventionnelle et la mise en cause contiennent les renseignements suivants :<br><br>**a)** la nature des dommages-intérêts demandés |