

IN THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

BETWEEN:

WANDA RER

Appellant

-and-

BESTMONT HOTELS

Respondent

FACTUM OF THE APPELLANT

TABLE OF CONTENTS

PART I – OVERVIEW	1
PART II – STATEMENT OF FACTS	2
1. PARTIES	2
2. CHRONOLOGY OF EVENTS	3
3. PROCEDURAL HISTORY	4
PART III – POINTS IN ISSUE	5
PART IV – ARGUMENTS IN BRIEF	5
1. MS. RER’S ORIGINAL PHOTOS, FILTERED PHOTOS AND COMPILATION ARE ORIGINAL	5
i. <i>Ms. Rer exercised sufficient skill and judgment in the creation of the Original Photos</i>	6
ii. <i>Ms. Rer exercised sufficient skill and judgment in the creation of the Filtered Photos</i>	6
iii. <i>Ms. Rer exercised sufficient skill and judgment in creating the Compilation</i>	8
2. BESTMONT INFRINGED MS. RER’S COPYRIGHT IN ALL OF HER WORKS	10
i. <i>Bestmont had access to the copyrighted works</i>	10
ii. <i>Bestmont copied a substantial part of all of Ms. Rer’s works</i>	11
A. Bestmont infringed Ms. Rer’s copyright in her Original Photos.....	11
B. Bestmont’s filtered images are a colourable imitation of Ms. Rer’s Filtered Photos.....	12
C. Bestmont substantially reproduced the Compilation	13
3. MS. RER SHOULD BE AWARDED THE MAXIMUM STATUTORY DAMAGES IN ADDITION TO PUNITIVE DAMAGES	14
i. <i>Bestmont’s use of the infringing materials was for a commercial purpose</i>	14
ii. <i>Ms. Rer should be awarded the maximum statutory damages</i>	15
A. Bestmont acted in bad faith.....	15
B. Bestmont’s conduct before and during the proceedings was reprehensible.....	16
C. The need to deter other infringements of the copyright in question	17
iii. <i>Ms. Rer should additionally be awarded punitive damages</i>	17
4. HOLDING BESTMONT LIABLE REINFORCES THE OBJECTIVES OF THE <i>COPYRIGHT ACT</i>	19
PART V - ORDER REQUESTED	20
PART VI - TABLE OF AUTHORITIES	21

PART I – OVERVIEW

1. This case is about protecting the fundamental right artists have from unauthorized use of their works by sophisticated entities. The Appellant, Wanda Rer (“Ms. Rer”) is a Canadian artist, photographer, and social media influencer. Ms. Rer created a set of 50 photographs that featured the marquee and architecture of hotels owned by the Respondent. The Respondent, Bestmont Hotels (“Bestmont”) is a Canadian luxury hotel chain that used Ms. Rer’s photographs without her consent for the very purpose they were taken - to market its hotels.

2. The purpose of the *Copyright Act* (the “Act”)¹ is to promote the encouragement and dissemination of expressive works while ensuring a just reward for the creators.² Copyright protection enables a creator of a work to benefit from their intellectual effort. It also incentivizes the creation of new forms of expression. Once copyright has been deemed to subsist in a work, the *Act* dictates that the copyright owner has the sole right to produce or reproduce the work or any substantial part thereof in any material form.³ Any unauthorized reproduction of a substantial part of a copyrighted work is a *prima facie* infringement.⁴

3. Ms. Rer is entitled to copyright protection for her entire set of 50 photographs (10 unfiltered, 40 filtered), both individually and as a compilation. The skill and judgment that she exercised in creating these photographs rose to a level sufficient to grant her copyright. Bestmont infringed her copyright in these photographs by imitating and reproducing them in its hotels without Ms. Rer’s permission or attribution.

4. Ms. Rer should receive the maximum statutory damages provided by law because Bestmont acted in bad faith. Additionally, exemplary damages should be awarded as Bestmont

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

² *Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34 at para 30 [Théberge].

³ *Act*, *supra* note 1 at s 3(1).

⁴ *Ibid* at s 27.

engaged in malicious, oppressive, and high-handed misconduct. Anything less would allow large companies to misappropriate the works of creators. These organizations have deep pockets that they may wield to force artists to abandon enforcement of their rights. Awarding less than the statutory maximum damages will exacerbate this power imbalance, as corporations will view a small award as a mere transactional cost of doing business. Consequently, this would do little to prevent future infringements by wealthy parties against creators.

5. Finding for Ms. Rer, by awarding the maximum statutory allowance and exemplary damages is also aligned with the purpose of the *Act*. First, it guarantees that creators receive their just reward. Second, it ensures that creators are neither discouraged from exercising their skill and judgment in generating new expressive works, nor discouraged from entering into negotiations for commercial licensing. Upholding the decision of Justice Lodge of the Trial Court of Canada Intellectual Property Division (“TCCIP”) is thus critical for realizing the fundamental objectives of copyright law.

PART II – STATEMENT OF FACTS

1. Parties

6. The Appellant, Wanda Rer, is a Canadian artist, photographer, and social media influencer. With almost a decade’s worth of experience as a photographer, Ms. Rer has amassed a substantial social media following. The Respondent, Bestmont Hotels, is a luxury Canadian hotel chain. It has many high-end hotels in prime locations across Canada.⁵

⁵ *Wanda Rer v Bestmont Hotels*, 21 TCCIP 1222 at paras 1, 2 [*Wanda Trial*].

2. Chronology of Events

7. Ms. Rer spent a year traveling and staying at each of Bestmont's hotels across Canada. Inspired by the uniqueness of the hotel's architecture, she took photographs of the hotel exteriors to document them for a photo project titled "Façades". Ms. Rer took each photo 100 feet away from the hotel in order to prominently feature the hotel's iconic marquee while still capturing the unique design features of the hotel's exterior. This technique was used to take a photograph in front of each Bestmont hotel resulting in 10 photographs. These images, referred to as the "Original Photos", were taken to compare the similarities and differences between the hotel designs. Ms. Rer also added four different filters to each of her Original Photos, resulting in 40 "Filtered Photos".⁶ The composite of all the Original Photos and Filtered Photos will be referred to as the "Compilation".

8. After completing her Façades project, Ms. Rer approached Bestmont to license her photos for Bestmont's marketing materials at a rate of \$3,000 per image for a total of \$150,000, if Bestmont were to license all the Original Photos and the Filtered Photos. Bestmont rejected her proposal and instead accused Ms. Rer of infringing its copyright in its hotel marquee and designs. Not only did Bestmont demand Ms. Rer dispose of all photos, but it also refused to return her package of high-resolution images. Subsequently, Bestmont adorned the walls of its hotels with Ms. Rer's photographs. Using different software, Bestmont mechanically applied the same filters which Ms. Rer had carefully selected to the set of electronic originals. Nowhere did Bestmont attribute credit to Ms. Rer for her original work.⁷

9. Bestmont ignored Ms. Rer's demand to take down the photos and only removed the images after Ms. Rer commenced legal action. Bestmont argued that there was no copyright in Ms. Rer's

⁶ *Ibid* at paras 3, 4, 5.

⁷ *Ibid* at paras 6, 7, 8.

photographs, and in the alternative that it was permitted to reproduce its own copyright in the hotel designs and marquee.⁸

3. Procedural History

10. The TCCIP disagreed with Bestmont, finding in favour of Ms. Rer. The TCCIP found that Bestmont reproduced Ms. Rer's work, concluding that copyright subsisted in each of the 10 Original and 40 Filtered Photos. Lodge J held that Bestmont's right to reproduce its own designs did not extend to allow it to reproduce Ms. Rer's originality. Having found 50 separate acts of infringement, Lodge J awarded damages at \$20,000 per work. Lodge J additionally awarded punitive damages of \$500,000, bringing the total damage award to \$1,500,000.⁹ Bestmont appealed the TCCIP's decision, seeking to overturn both the Court's finding that Bestmont infringed Ms. Rer's copyright and the damage award of \$1,500,000.

11. The Court of Appeal Intellectual Property Division ("CAIP") allowed the appeal. Lobi JA found that Bestmont was immune from Ms. Rer's infringement allegations because it owned the copyright in its hotel designs and the marquee. Lobi JA found that the TCCIP's reliance on paragraph 32.2(1)(b) to conclude that Ms. Rer's images were derivative works was misguided. The Court held that this section did not confer Ms. Rer the right to assert copyright against others. Lobi JA concluded that Ms. Rer did not apply sufficient originality in the taking of the photos and found that Bestmont's use of filters did not amount to a substantial reproduction.¹⁰

12. The CAIP also disagreed with Lodge J's award of damages. Lobi JA found that Bestmont did not use the images for a commercial nature. The Court found that the award was grossly out of proportion to the infringement, concluding that Bestmont did not act in bad faith and that any

⁸ *Ibid* at paras 9, 10.

⁹ *Ibid* at paras 16, 18, 20.

¹⁰ *Bestmont v Wanda Rer*, 2021 CAIP 333 at paras 2, 3, 5 [*Wanda Appeal*].

analysis of such behavior could be dealt with within the range of statutory damages. Instead, a more reasonable award would have been \$15,000 since damages are meant to be compensatory and Ms. Rer offered to license each of the 10 Original Photos for \$3,000 each. Given that the infringements were in the same medium, the Court applied subsection 38.1(3) to reduce the award from \$30,000 to \$15,000.¹¹

PART III – POINTS IN ISSUE

13. The present appeal raises three issues:

1. Are Ms. Rer’s Original Photos, Filtered Photos and Compilation original and thus subject to copyright?
2. Did Bestmont infringe Ms. Rer’s copyright in each of the Original Photos, Filtered Photos and Compilation?
3. What is the appropriate quantum of statutory and punitive damages?

PART IV – ARGUMENTS IN BRIEF

1. Ms. Rer’s Original Photos, Filtered Photos and Compilation are original

14. Subsection 5(1) of the *Act* states that copyright shall subsist in every *original* artistic work.¹² Per section 2, artistic work includes photographs and compilations.¹³ Furthermore, the work need not be registered under the *Act* for copyright to subsist.¹⁴

15. For a work to be original and therefore worthy of protection under the *Act*, it must be independently created.¹⁵ Originality requires an exercise of skill and judgment, that is neither trivial nor *purely* mechanical. Skill is defined by one’s knowledge, developed or practiced ability

¹¹ *Ibid* at paras 7, 8, 9.

¹² *Act*, *supra* note 1 at s 5(1).

¹³ *Ibid* at s 2.

¹⁴ *Théberge*, *supra* note 2 at para 8.

¹⁵ *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 18 [*CCH*].

in producing the work, and judgment involves the use of one's capacity for discernment or ability to form an opinion or evaluation.¹⁶ While this exercise involves intellectual effort by the author, it is not a high standard. Accordingly, whether a work imbues a creative spark or artistic genius is irrelevant in considering its originality. Thus, the work need not be novel nor unique.¹⁷

i. Ms. Rer exercised sufficient skill and judgment in the creation of the Original Photos

16. Ms. Rer exercised skill and judgment in taking the Original Photos. Courts have found the exercise of skill and judgment in photography to include the choice of angle of view, lighting, arrangement, and pose of the subject.¹⁸ Ms. Rer used her knowledge and her practiced skill as a photographer of nearly a decade to take photos of the ten hotel exteriors. She exercised her judgment in discerning a specific distance and camera setup that would prominently feature the marquees as the focus, while still depicting each hotel's unique façade.

17. Each of the ten Original Photos had sufficient originality to attract copyright. Following a standardized procedure to take photos does not reduce the exercise of taking photos to a simple mechanical exercise.¹⁹ Accordingly, Ms. Rer's choice to take each photo at the same distance of 100 feet does not reduce the taking of each Original Photo to a simple mechanical exercise. Rather, the standardized distance created a comparative aesthetic signature across all Original Photos, reinforcing Ms. Rer's use of skill and judgment.

ii. Ms. Rer exercised sufficient skill and judgment in the creation of the Filtered Photos

18. Copyright subsists in the filtered images because Ms. Rer exercised skill and judgment in selecting and applying filters to the Original Photos. Using her knowledge of social media, Ms.

¹⁶ *Ibid* at para 16.

¹⁷ *Ibid*.

¹⁸ *Ateliers Tango Argentin Inc. c Festival d'Espagne & d'Amerique Latine*, [1997] RJQ 3030, 84 CPR (3d) 56 (QCCS) at para 39 [*Ateliers*].

¹⁹ *Trader Corp v CarGurus, Inc*, 2017 ONSC 1841 at para 24.

Rer selected and applied four specific filters from countless available options, with the goal of appealing commercially to a large demographic. The photos evidently resonated with a large demographic as Bestmont made the exact same choices, replicating the filters used by Ms. Rer.

19. Using her judgment as an influencer, Ms. Rer chose filters which were popular and would enhance the depiction of the hotel designs and marquee.²⁰ She exercised skill in selecting filters to highlight certain characteristics in the photos through lighting and colour manipulation.

20. Canadian courts have not explicitly addressed whether applying filters requires the use of sufficient skill and judgment. In *Goldi Productions Ltd et al v Bunch*, the Superior Court of Ontario found that putting a photo through a computer program to enhance the photo was a “purely mechanical process” and did not demonstrate sufficient skill and judgment.²¹ However, the Court did not foreclose the possibility of other processes of manipulation being original.²² Unlike *Goldi*, Ms. Rer’s choice of filters alters the entire look and feel of the image. They are not meant to *merely* enhance what is already there, as the plaintiff Goldi attempted by restoring the photos. Instead, Ms. Rer’s use of the filters fundamentally alters the visual characteristics of the images. While both used programs to alter the images, Ms. Rer exercised skill and judgment in choosing exactly how the images would be altered. Additionally, unlike *Goldi*, Ms. Rer had copyright in the Original Photos she used to filter.

21. Ms. Rer’s use of filters is more akin to the cropping tool used to manipulate photos. In *Capitale en fête Inc c Ouellet*,²³ the Superior Court of Quebec found that the process of cropping a photo required sufficient skill and judgment. The Court stated that choosing a software and applying the appropriate tools when cropping a photo requires a certain level of knowledge, skill

²⁰ *Wanda Trial*, *supra* note 5 at para 5.

²¹ *Goldi Productions Limited. v Bunch* (1 August 2018), Brampton 15-5800 (ON Sm Cl Ct) at para 16 [*Goldi*].

²² *Ibid.*

²³ *Capitale en fête inc c Ouellet*, 2019 QCCQ 2607.

and judgment, which must be acquired through experience. The desired result is an amalgamation of these elements.²⁴ Drawing on her experience, Ms. Rer chose the specific software to use and selected the appropriate filters to create the Filtered Photos. Since cropping a photo requires sufficient skill and judgment, Ms. Rer’s selection and application of filters also requires skill and judgment.

22. The United Kingdom and Wales Patents County Court found that photo enhancement and manipulation using widely available software may require skill and judgment. The Court in *Temple Island Collections Ltd v New English Teas Ltd* stated that originality in photographs could reside in the process of photomanipulation through the “exposure and effects achieved with *filters* [and] developing techniques”.²⁵ This persuasive case demonstrates that common law courts have offered copyright protection to photos created through photomanipulation. Ms. Rer’s Filtered Photos meet this criterion; they do not merely restore the original photo, rather they alter the visual composition of the photo.

iii. Ms. Rer exercised sufficient skill and judgment in creating the Compilation

23. Ms. Rer exercised sufficient skill and judgment in selecting and arranging the Compilation, making it original. The Compilation was composed of 50 photographs: 10 Original Photos and 40 Filtered Photos. By carefully selecting and arranging the photos in the Compilation, Ms. Rer emphasized Bestmont’s marquees and its architecture.

24. The *Act* defines a compilation as a work resulting from a selection or an arrangement of artistic works or parts thereof.²⁶ In essence, a compilation takes existing material and casts it in different forms.²⁷ Hence, the individual constituents need not be original; the claimant needs to

²⁴ *Ibid* at para 58.

²⁵ *Temple Island Collections Ltd v New English Teas Ltd*, [2012] EWPC 1 at para 22.

²⁶ *Act*, *supra* note 1 at s 2.

²⁷ *CCH*, *supra* note 15 at para 33.

establish only that her exercise of skill or judgment in either selection *or* arrangement exceeded that of a pure mechanical exercise.²⁸

25. Selection is the exercise of skill and judgment to choose *what* will go into a compilation.²⁹ Ms. Rer’s selection includes *only* her Original Photos and its corresponding Filtered Photos, instead of photos by others of the iconic marquees. Every photo in Ms. Rer’s Compilation was carefully chosen to follow a uniform theme—highlighting the famous Bestmont marquees. Using her refined skills as a photographer for nearly a decade, she meticulously calculated her choices so that each selected filtered photo emphasized the comparable and contrasting features of Bestmont’s marquees and architectural designs. In this sense, Ms. Rer’s selection was more than a simple mechanical exercise, as it was coordinated so that the photos could be best appreciated as a compilation.

26. Arrangement “refers to the ordering or grouping...that go beyond the mere mechanical grouping of data, for example, the alphabetical, chronological, or sequential listing of data.”³⁰ Ms. Rer’s skill and judgment in arranging the photos came from assembling the Original Photos with its corresponding Filtered Photos. Like her selection, this arrangement made the distinctive and similar features of the marquees and architectural design more pronounced. Consequently, copyright subsists in the Compilation.

²⁸ *Slumber-Magic Adjustable Bed Co v Sleep-King Adjustable Bed Co* (1984), [1985] 1 WWR 112, 3 CPR (3d) 81 (BCSC) citing *Ladbroke (Football), Ltd v William Hill (Football) Ltd*, [1964] 1 WLR 273, [1964] 1 All ER 465 (HL).

²⁹ William Patry, “Copyright in compilations of facts (or why the ‘white pages’ are not copyrightable)” (1990) 12:4 *Communications and the Law* 37 at 57 cited in *Key Publications, Inc v Chinatown Today Pub Enterprises, Inc*, 945 F.2d 509 (2nd Circ 1991). The definition of “selection” and “arrangement” have yet to be clearly articulated in Canadian courts. However, William Patry, a former copyright counsel to the US House of Representatives articulated a clear definition, adopted by American courts.

³⁰ *Ibid* at 60.

2. Bestmont infringed Ms. Rer's copyright in all of her works

27. Under subsection 13(1), “the author of a work shall be the first owner of the copyright therein.”³¹ While the *Act* does not explicitly define “author”, courts have understood it to mean a person who *expresses* an idea, rather than creating it.³² The author must exercise skill and judgment in bringing that work to life. Ms. Rer is the author and first owner of the Original Photos, Filtered Photos and the Compilation, as she exercised skill and judgment in creating these works.

28. Subsection 3(1) of the *Act* gives the owner the *sole* right to produce or reproduce, the original work or any substantial part thereof in any material form. Consequently, per subsection 27(1), without the owner granting authorization, a production or reproduction of the work or any substantial part thereof by anyone else will constitute an infringement. Additionally, section 2 defines “infringing” to include any colourable imitation.³³

29. To find copyright infringement, the claimant must establish: (i) access to the copyright protected work; and (ii) proof of copying of the work or a substantial part thereof.³⁴

i. Bestmont had access to the copyrighted works

30. A claimant alleging infringement must establish a causal connection by showing that the defendant had access to the plaintiff's work.³⁵ Ms. Rer provided high resolution copies of all of her photos to Bestmont which it subsequently reproduced and displayed without her authorization. Hence, Bestmont did not independently create these works.

³¹ *Act*, *supra* note 1 at s 13(1).

³² *Kantel v Grant* 1993 Ex CR 84 at para 12.

³³ *Act*, *supra* note 1 at ss 2, 3(1) and 27(1).

³⁴ *U & R Tax Services Ltd v H & R Block Canada Inc*, [1995] 97 FTR 259, 62 CPR (3d) 257 (FCTD) at 268 and 269. See also *Ital-Press Ltd v Sicoli*, [1999] 170 FTR 66, 86 CPR (3d) 129 (FCTD) at para 122.

³⁵ *Atomic Energy of Canada v Areva*, 2009 FC 980 at para 35. See also *Francis Day and Hunter Ltd v Bron*, [1963] Ch 587, [1963] 2 All ER 16 (Eng CA).

ii. *Bestmont copied a substantial part of all of Ms. Rer's works*

31. Although the *Act* does not define what constitutes a substantial part of a work, courts have interpreted this to be an issue of fact and law.³⁶ Instead of taking a piecemeal approach that focuses on comparing isolated fragments, Canadian courts have adopted a holistic approach in assessing substantiality that compares the two works as a whole.³⁷

32. In essence, whether there has been substantial copying focuses on whether the copied features constitute a substantial part of the plaintiff's work, not the defendants.³⁸ Generally, a substantial part is a portion of the work that represents a substantial portion of an author's skill and judgment. As such, the *quality* and the nature of what was reproduced weighs more than the quantity of reproduction.³⁹

33. Moreover, substantiality is a flexible notion: it is a matter of fact, degree, and context.⁴⁰ The simpler the copyrighted work, the greater the need to establish exact copying in order establish infringement.⁴¹ Conversely, reproducing a prominent feature that characterizes the *true essence* of a work suggests a stronger presumption of infringement. Therefore, differences between the two works are relevant only insofar as they change the true essence of the work.⁴²

A. *Bestmont infringed Ms. Rer's copyright in her Original Photos*

34. Copying an entire photograph is *prima facie* a violation of copyright.⁴³ Bestmont printed and framed the Original Photos. It then "used [the Original Photos] to decorate the hallways of

³⁶ *Cinar Corporation v Robinson*, 2013 SCC 73 at para 30 [*Robinson*].

³⁷ *Ibid* at paras at 35, 36.

³⁸ *Ibid* at para 39.

³⁹ *Ibid* at para 26.

⁴⁰ *Ibid*.

⁴¹ *Pyrha Design Inc v Plum and Posey Inc*, 2019 FC 129 at para 123.

⁴² *Robertson v Thomson*, 2006 SCC 43 at paras 39, 40 [*Robertson*].

⁴³ *Century 21 Canada Ltd Partnership v Rogers Communication Inc*, 2011 BCSC 1196 at para 205.

their guest floors.”⁴⁴ Accordingly, Bestmont violated the copyright in each of Ms. Rer’s Original Photos by reproducing and displaying the Original Photos in its hotels without Ms. Rer’s consent.

35. Bestmont’s filtered images are also a substantial reproduction of Ms. Rer’s Original Photos. Bestmont “took the electronic version of each Original Photo and applied eleven different filters to create a dozen images for each hotel.”⁴⁵ Bestmont’s filtered images violated Ms. Rer’s copyright in her Original Photos as Bestmont added filters to slightly alter Ms. Rer’s Original Photos, in an attempt to pass off a reproduced work as novel by making alterations to the form of the original.⁴⁶ Alterations to an original copyrighted work still constitute a copy.⁴⁷ Thus, Bestmont’s filtered images infringed Ms. Rer’s copyright in her Original Photos

B. Bestmont’s filtered images are a colourable imitation of Ms. Rer’s Filtered Photos

36. The originality in the filtered images resides in the selection and application of specific filters to the Original Photos. By using the same filters on Ms. Rer’s photos, albeit with a different software, Bestmont substantially reproduced the originality of the Filtered Photos. Bestmont created a colourable imitation of Ms. Rer’s Filtered Photos, infringing her copyright.

37. Copyright infringement is established when the defendant produces a colourable imitation of the plaintiff’s work; infringement does not require an exact copy. A colourable imitation exists when

the infringer attempts to pass off as novel a work which is only a reproduction of ... another work, by making alterations to the form of the original ... The term ‘colourable’ ordinarily denotes an element of deception or camouflage; a person

⁴⁴ *Wanda Trial*, *supra* note 5 at para 8.

⁴⁵ *Ibid.*

⁴⁶ *Rains v Molea*, 2013 ONSC 5016 at para 45 [*Rains*].

⁴⁷ *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57 at para 49 [*CBC*]. See also *Théberge*, *supra* note 2 at para 42.

may therefore be said to infringe a work by modifying it in such a way as to conceal such infringement.⁴⁸

Modifying the form of an image does not protect one from infringement if a substantial part of the imitated work has been reproduced.⁴⁹

38. In *Ateliers Tango Argentin Inc c Festival d'Espagne & d'Amérique Latine*, the Court found that the defendant, Mr. Bueno, infringed the plaintiff's copyright because he recreated a photo the plaintiff had taken using different dancers as subjects.⁵⁰ Like Mr. Bueno, upon failed negotiations, Bestmont recreated Ms. Rer's Filtered Photos by using the same filters. While Bestmont used a different program to retrieve the same filters, it had the same visual effect—namely the same lighting and colouring. Ms. Rer's Filtered Photos are recognizable in Bestmont's filtered photos because they are essentially identical. Although these filters are popular and widely available, the decision to apply them to these specific images is not a mere coincidence of independent creation; it is a colourable imitation of Ms. Rer's Filtered Photos.

C. Bestmont substantially reproduced the Compilation

39. Bestmont substantially reproduced the Compilation by displaying it throughout its hotel interiors. First, it made a substantial copy of the selection. The Court in *Wiseau Studios LLC et al v Harper et al* held that incorporation of an original work into a new work, even if it includes additional features and rearrangements, can be a substantial copying of the original work.⁵¹ In that case, the defendant, Harper, included seven minutes of the plaintiff's 99-minute-long movie in his documentary. By incorporating Ms. Rer's entire selection of photos in decorating its hotel

⁴⁸ May M Cheng & Michael Shortt, "Colourable Imitation: The Neglected Foundation of Copyright Law" (2012) 17 Intellectual Property 1131, as cited in *Rains*, *supra* note 46 at para 45.

⁴⁹ *Ateliers*, *supra* note 18 at para 74.

⁵⁰ *Ibid* at para 75.

⁵¹ *Wiseau Studios LLC et al v Harper et al*, 2020 ONSC 2504 at para 164. See also *Robinson*, *supra* note 36 at paras 38-41.

interiors, Bestmont made a greater substantial reproduction than Harper. Accordingly, Ms. Rer's theme of highlighting the distinctive Bestmont marquees and architecture subsists in Bestmont's decoration.

40. Bestmont also made a substantial copying of the arrangement. Making minor alterations to a compilation will not negate the copying of a substantial part of a compilation.⁵² Similarly, substantial copying of a work can be found when the true essence of a work subsists in the copy.⁵³ The true essence of the Compilation is Ms. Rer's coordinated arrangement of Original Photos in conjunction with the Filtered Photos. This arrangement highlights the distinctive characteristics of each of Bestmont's marquees and architecture. Bestmont's inclusion of other decorations, including its additional filtered photos, only enhances this effect as it makes it more apparent to its visitors. As such, the true essence of the Compilation persists in Bestmont's interior design, making it a substantial copy of Ms. Rer's Compilation.

3. Ms. Rer should be awarded the maximum statutory damages in addition to punitive damages

i. Bestmont's use of the infringing materials was for a commercial purpose

41. Paragraph 38.1(1)(a) of the *Act* provides a range of awardable statutory damages between \$500 and \$20,000 when an infringement is used for commercial purposes.⁵⁴ Ms. Rer's photos, both alone and as a compilation, were used to enhance the patron experience. By highlighting the hotels' unique architecture, the photos encouraged both word-of-mouth referrals and repeated stays. The photographs were used in the very way that Ms. Rer had initially developed them for to be used as marketing tools. Bestmont made the decision to display the photos in its hotels with

⁵² *Slumber-Magic*, *supra* note 28 at 5, 6.

⁵³ *Robertson*, *supra* note 42 at paras 38-40.

⁵⁴ *Act*, *supra* note 1 at s 38.1(1)(a).

a view towards increasing profits while denying Ms. Rer her rightful share. Ms. Rer's photos were a part of Bestmont's branding as they were used in the halls of its multiple hotels across the entire country. As this was for a commercial purpose, the infringement lies within the ambit of paragraph 38.1(1)(a).

ii. *Ms. Rer should be awarded the maximum statutory damages*

42. Paragraphs 38.1(5)(a), (b), and (c) of the *Act* require a court to exercise its discretion when awarding statutory damages. A court must consider all relevant factors, including (a) the good or bad faith of the defendant; (b) the conduct of the parties before and during the proceedings; and (c) the need to deter other infringements.⁵⁵

A. *Bestmont acted in bad faith*

43. From the start, Bestmont acted in bad faith. Thus, a higher quantum of damages should be awarded. Bestmont gave the impression that it had no interest in Ms. Rer's photos, only to turn around and use her photos for its own gain. It could have easily taken its own photos. However, it did not. Bestmont deliberately used Ms. Rer's photos without her consent, misappropriating her skill and judgment as its own. Despite multiple requests following the initial proposal, Bestmont refused to return Ms. Rer's package, showing an intention to retain and use Ms. Rer's work from the start.⁵⁶ Additionally, in refusing to return Ms. Rer's package, Bestmont not only infringed Ms. Rer's copyright in her photos, but also her property rights in the physical package.

44. Moreover, in failing to credit Ms. Rer for her work and representing it as its own, Bestmont showed a continued and blatant disregard for Ms. Rer's copyright. The scope of Bestmont's infringement is substantial. It was not an inconsequential mistake; Bestmont repeatedly displayed

⁵⁵ *Ibid* at s 38.1(5)(a), (b), (c). See also *Telewizja Polsat SA v Radiopol Inc*, 2006 FC 584 at para 34 and *Young v Thakur*, 2019 FC 835 at para 62.

⁵⁶ *Wanda Trial*, *supra* note 5 at para 7.

Ms. Rer's photos in each of its hotels across the country.⁵⁷ This was a large-scale deliberate attempt to steal an artist's work to further its own commercial success throughout Canada. Courts have awarded maximum statutory damages when the infringing activity results in a large benefit to the infringer.⁵⁸ Although it is difficult to place a monetary value on the exact benefit conferred on Bestmont from its infringements, the scope of its infringing conduct suggests a substantial benefit. Bestmont's repeated acts of bad faith indicate a need for the maximum amount of statutory damages to be awarded.

B. Bestmont's conduct before and during the proceedings was reprehensible

45. Bestmont's conduct before the proceedings was reprehensible. It ignored Ms. Rer's initial assertion of her rights. Instead, like the defendants in *Canada (Attorney General) v Rundle*⁵⁹ and *Microsoft Corporation v 1276916 Ontario*,⁶⁰ Bestmont continued its infringing conduct after Ms. Rer asserted her rights. The plaintiffs in *Rundle* and *Microsoft* were respectively awarded \$15,000 per work⁶¹ and \$10,000 per work plus exemplary damages.⁶² These cases indicate judicial proclivity towards awarding higher damages when an infringer knowingly ignores and continues to infringe a copyright. Here, Bestmont not only ignored Ms. Rer's assertion of her rights but threatened legal action of its own to intimidate Ms. Rer into not exercising her rights. This suggests an even higher award of damages than that awarded in *Rundle* and *Microsoft* would be appropriate, justifying the trial judge's award of \$20,000.

46. A large nationwide hotel chain like Bestmont is more legally sophisticated than Ms. Rer, an independent artist. Bestmont attempted to exploit this disparity to dissuade Ms. Rer from

⁵⁷ *Ibid* at para 8.

⁵⁸ *Microsoft Corporation v 9038-3746 Quebec Inc*, 2006 FC 1509 at para 105.

⁵⁹ *Canada (Attorney General) v Rundle*, 2014 ONSC 2136 [*Rundle*].

⁶⁰ *Microsoft Corporation v 1276916 Ontario*, 2009 FC 849 [*Microsoft*].

⁶¹ *Rundle*, *supra* note 59 at para 21.

⁶² *Microsoft*, *supra* note 60 at para 55.

pursuing a claim that she was legally entitled to make. Subparagraph 32.2(1)(b)(i) of the *Act* explicitly permits reproductions of architectural works in photographs.⁶³ As a large corporation, Bestmont would likely be well versed in copyright law, especially concerning the reproduction of its iconic architecture. Bestmont presumably knew that it had no infringement claim against Ms. Rer when it threatened legal action. Accordingly, the threat was likely made as an intimidation tactic, rather than a genuine assertion of rights. Overall, Bestmont's conduct prior to the proceedings indicates a need for the maximum quantum of statutory damages.

C. The need to deter other infringements of the copyright in question

47. This case consists of a large corporation attempting to take advantage of an independent artist. Ms. Rer's position is emblematic of the power imbalance between independent artists and large corporations. Damages should be sufficiently high to deter future infringements on the part of the named Defendants as well as other parties.⁶⁴ A lower statutory award will not deter future infringements, as large corporations will see it as a mere transactional cost of infringing conduct. Similarly, the Court should not exercise its discretion in applying subsection 38.1(3) because of the severity of Bestmont's conduct. A maximum award of statutory damages is necessary in this case to sufficiently deter future infringements of this kind.

iii. Ms. Rer should additionally be awarded punitive damages

48. Punitive damages are appropriate because Bestmont engaged in "malicious, oppressive, and high-handed" misconduct that "offend[ed] the court's sense of decency".⁶⁵ Although *Whiten* appears to require a pleading of punitive damages, the absence of one is not fatal.⁶⁶ The critical element justifying the need to plead punitive damages is to ensure that defendants are not "taken

⁶³ *Act*, *supra* note 1 at s 32.2(1)(b)(i).

⁶⁴ *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2020 FC 794 at para 42 [*Rallysport*].

⁶⁵ *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 36.

⁶⁶ *563815 Ontario Inc v Nassif*, 2021 ONSC 5195 at para 104.

by surprise".⁶⁷ Alleging breaches of obligations to good faith and fair dealing can provide adequate warnings.⁶⁸ Ms. Rer made factual allegations alleging that Bestmont acted in bad faith, thus providing an adequate warning to Bestmont.

49. Furthermore, subsection 38.1(7) of the *Act* provides that an election of statutory damages does not affect any right to exemplary or punitive damages.⁶⁹ The *Act* does not require a plaintiff to explicitly plead punitive damages. Accordingly, Ms. Rer's failure to explicitly plead punitive damages does not constrain the Court's ability to give any award they deem just.⁷⁰

50. Bestmont's conduct is analogous to other cases where punitive damages have been awarded. In *Rallysport Direct LLC v 242508 Ontario Ltd*, exemplary damages were awarded against a defendant who made efforts to judgment proof their actions through the use of various companies, while continuing to exploit the plaintiff.⁷¹ Similarly, Bestmont attempted to avoid legal proceedings through intimidation tactics while knowingly exploiting Ms. Rer's works on a large scale throughout the entire country.

51. In *Collet v Northland Art Company Canada Inc*, punitive damages were awarded against the defendant because their multiple infringements were planned and deliberate. These actions were motivated by profit.⁷² Similarly, Bestmont demonstrated a complete disregard for Ms. Rer's interests. The record clearly establishes an intention on Bestmont's part to infringe Ms. Rer's rights from the outset of their dealings. Bestmont disregarded Ms. Rer's economic and legal interests in her copyright in the pursuit of profit. Furthermore, in continuing to infringe Ms. Rer's works,

⁶⁷ *Malton v Attia*, 2015 ABQB 135 at para 693.

⁶⁸ *Ibid.*

⁶⁹ *Act*, *supra* note 1 at s 38.1(7).

⁷⁰ *Courts of Justice Act*, RSO 1990, c C-43 at s 2.01(a).

⁷¹ *Rallysport*, *supra* note 64.

⁷² *Collet v Northland Art Company Canada Inc*, 2018 FC 269.

Bestmont exhibited a careless disregard for copyright law in general.

52. Bestmont likely knew the risk of potential proceedings arising from its deliberate and malicious conduct. However, it *chose* to assume this risk, presuming that the damages awarded would be insignificant compared to the profits. Should the Court award only statutory damages, creators will have insufficient protection for their works. They will remain vulnerable to bad corporate actors, who will view the cost of infringement as the mere cost of doing business. If Bestmont is not properly held accountable for their reprehensible actions, creators will be discouraged from disseminating their works. This would undermine the *Act*'s very purpose.

4. Holding Bestmont liable reinforces the objectives of the *Copyright Act*.

53. The Supreme Court of Canada in *Théberge* held that “[t]he purpose of copyright law [is] to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creators”.⁷³ Not holding Bestmont liable to an adequate degree, that is, liable to punitive damages and to the maximum end of statutory damages, would create three outcomes which are contrary to the purpose of the *Act*.

54. First, the proper balance of promoting the encouragement and dissemination of works and justly rewarding creators will be improperly skewed against creators, as Ms. Rer would not receive a just reward for her authorial expression.

55. Second, it will have the effect of discouraging creators from making works of art and intellect. Creators will be reluctant to create expressive works when they know said works can be stolen, with the punishment for such actions being merely a slap on the wrist.⁷⁴

56. Third, creators will also be disincentivized from disseminating their works. This problem

⁷³ *Théberge*, *supra* note 2 at para 30. See also *CCH*, *supra* note 15 and *CBC*, *supra* note 47.

⁷⁴ Matthew Marinett, “The Alienation of Economic Rights and the Case for Stickier Copyright” (2017) 30:1 30 IPJ 125 (WL).

is further amplified in the digital age where works of art and intellect are arguably more accessible than ever because of copying and pasting. Large, wealthy corporations, like Bestmont, are well positioned to easily access and reproduce the works of creators. Additionally, not holding Bestmont accountable to the maximum degree has the effect of undermining licensing and negotiation processes that further the dissemination of works of art and intellect. Creators like Ms. Rer may be reluctant to approach corporations and offer their works for licensing deals if these corporations can take a creator's work with impunity.

57. The trial judge's decision is consistent with the fundamental objectives of copyright law. Holding Bestmont liable to the maximum degree recognizes the rights of creators *and* furthers the public interest in promoting the encouragement and dissemination of works. Finding otherwise would do neither. Instead, it would undermine the very foundation of copyright law.

PART V - ORDER REQUESTED

58. The Appellant respectfully requests this appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 14th day of January, 2022.

Team No. 7

Counsel for the Appellant

PART VI - TABLE OF AUTHORITIES

AUTHORITY	Pinpoint
LEGISLATION	
<i>Copyright Act</i> , RSC 1985, c C-42.	ss 2, 3(1), 5(1), 13(1), 27(1), 32.2(1)(b)(i), 38.1(1)(a), 38.1(5)(a)(b)(c), 38.1(7)
<i>Courts of Justice Act</i> , RSO 1990, c C-43.	s 2.01(a)
JURISPRUDENCE	
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<i>Atomic Energy of Canada v Areva</i> 2009 FC 980.	35
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<i>Microsoft Corporation v 1276916 Ontario</i> , 2009 FC 849.	55
<i>Microsoft Corporation v 9038-3746 Quebec Inc</i> , 2006 FC 150.	105
<i>Pyrrha Design Inc v Plum and Posey Inc</i> , 2019 FC 129.	123
<i>Rains v Molea</i> , 2013 ONSC 5016.	45
<i>Rallysport Direct LLC v 2424508 Ontario Ltd</i> , 2020 FC 794.	42
<i>Robertson v Thomson</i> , 2006 SCC 43.	38, 39, 40
<i>Slumber-Magic Adjustable Bed Co v Sleep-King Adjustable Bed Co</i> (1984), [1985] 1 WWR 112, 3 CPR (3d) 81 (BCSC).	5, 6
<i>Temple Island Collections Ltd v New English Teas Ltd</i> , [2012] EWPC 1.	5, 6
<i>Telewizja Polsat SA v Radiopol Inc</i> , 2006 FC 584.	34
<i>Théberge v Galerie d’Art du Petit Champlain Inc</i> , 2002 SCC 34.	8, 30
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<i>U & R Tax Services Ltd v H & R Block Canada Inc</i> , [1995] 97 FTR 259, 62 CPR (3d) 257 (FCTD).	268, 269

<i>Wanda Rer v Bestmont Hotels</i> , 21 TCCIP 1222.	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 16, 18, 20
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William Patry, "Copyright in compilations of facts (or why the 'white pages' are not copyrightable)" (1990) 12:4 Communications and the Law 37 cited in <i>Key Publications, Inc v Chinatown Today Pub Enterprises, Inc</i> , 945 F.2d 509 (2nd Circ 1991).	57, 60