

IN THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

BETWEEN:

WANDA RER

Appellant

-and-

BESTMONT HOTELS

Respondent

FACTUM OF THE RESPONDENT

TABLE OF CONTENTS

PART I – OVERVIEW	1
PART II – STATEMENT OF FACTS	2
1. Parties	2
2. Chronology of Events	2
3. Procedural History	3
PART III – POINTS IN ISSUE	4
PART IV – ARGUMENTS IN BRIEF	4
1. There is no originality in Ms. Rer’s works	4
i. <i>Ms. Rer did not exercise sufficient skill and judgment in the Original Photos</i>	5
ii. <i>Ms. Rer did not exercise sufficient skill and judgment in the Filtered Photos</i>	6
iii. <i>There is no originality in the Compilation</i>	8
iv. <i>Subparagraph 32.2(1)(b)(i) can only be used as a shield and not as a sword</i>	9
v. <i>Bestmont was exercising its s 3(1) rights by displaying the Original Photos</i>	10
2. Bestmont did not infringe Ms. Rer’s works	10
i. <i>Access and sufficient similarity</i>	11
ii. <i>Bestmont’s filtered photos arose independently from the use of common techniques</i>	11
iii. <i>Bestmont did not infringe Ms. Rer’s Compilation</i>	12
3. If statutory damages are awarded, it should be the lowest quantum	12
i. <i>Bestmont’s display and reproduction of the photos was not for a commercial purpose</i>	13
ii. <i>The circumstances warrant the lowest quantum of statutory damages</i>	14
A. <i>Paragraph 38.1(5)(a): Bestmont acted in good faith</i>	14
B. <i>Paragraph 38.1(5)(b): The conduct of the parties</i>	14
C. <i>Paragraph 38.1(5)(c): There is no need to deter other infringements</i>	15
D. <i>Paragraph 38.1(5)(d): Non-commercial purposes</i>	15
E. <i>A high quantum of damages is grossly disproportionate to the infringement</i>	16
iii. <i>If statutory damages are assessed under s 38.1(1)(a), they should be reduced</i>	16
iv. <i>Punitive damages should not be awarded against Bestmont</i>	17
4. Holding Bestmont liable violates the purpose of the Act	18
PART V – ORDER REQUESTED	20

PART I – OVERVIEW

1. This case is about a disgruntled copier with unprotectable works, attempting to use the sympathy of the Court to assert copyright against the owner of the underlying work. Should such a copier be able to exploit a statutory exception to infringement against an owner? The Respondent's position is no. The Respondent, Bestmont Hotels, (“Bestmont”), is a Canadian luxury hotel chain which owns ten carefully designed hotels in prime destinations across Canada. The Appellant, Wanda Rer, (“Ms. Rer”), is a social media influencer who is seeking to assert copyright over photos she took of Bestmont’s copyrighted marquee and architecture.

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 is granted to original works. An original work expresses an idea through the exercise of skill and judgment that is “not so trivial to be a mechanical exercise”.³ Actionable infringement must copy the expression, and not the mere idea, concept, or underlying facts.⁴

3. Bestmont is entitled to display photos of its marquee and architecture in its hotels. Ms. Rer cannot claim infringement of her works as they were not created using the requisite level of skill and judgment. Ms. Rer is also seeking to incorporate the American doctrine of derivative works into Canadian law by using s 32.2(1)(b) as a sword rather than a shield. This provision states that it is not an infringement to reproduce an architectural work as a photograph.⁵

4. Ms. Rer is not entitled to damages as her works are not original. If the Court were to find originality and infringement, statutory damages should be minimal as the photos were for a non-

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 *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 16 [CCH].

⁴ *Act*, *supra* note 1 at s 27(1).

⁵ *Ibid* at s 32.2(1)(b).

commercial purpose. Punitive damages are also inappropriate. Far from offending the Court’s sense of decency, Bestmont was motivated by a reasonable interpretation of the law.

5. Bestmont should not be punished for seeking to exercise its *bona fide* belief in its copyright. Finding for Ms. Rer would expand the scope of copyright law to protect ideas as opposed to original expression, seriously hampering the ability of creators to use similar ideas to create new works. Finding originality in Ms. Rer’s works would lower the originality standard, allowing copyright to extend to those merely exercising labour and effort in the creation of a work. The decision of the Court of Appeal Intellectual Property Division (“CAIP”) properly balances the competing interests of creators and the public domain.

PART II – STATEMENT OF FACTS

1. Parties

6. The Appellant, Wanda Rer, is a self-described social media influencer. The Respondent, Bestmont Hotels, is a reputable Canadian luxury hotel chain. It has carefully designed high-end hotels in locations across Canada. Bestmont’s hotels are best known for their unique designs and the famous red marquee that adorns the entrance of each hotel. Bestmont has registered Canadian copyright in its hotel designs and marquee.⁶

2. Chronology of Events

7. Ms. Rer stayed at each of Bestmont’s hotels. Inspired by the hotels’ uniqueness, Ms. Rer photographed the hotel exteriors for a photo project titled “Façades”. She took each photo 100 feet away from the hotel to prominently feature the hotel’s iconic marquee while still capturing the unique design features of the hotel’s façades. Ms. Rer repeated the same technique and set up for

⁶ *Wanda Rer v Bestmont Hotels*, 21 TCCIP 1222 at paras 1, 2, 3-5, 11 [*Wanda Trial*].

each hotel, creating ten “Original Photos”. She then applied four popular filters using a social media platform to each of the Original Photos, resulting in 40 “Filtered Photos”.⁷

8. Subsequently, Ms. Rer offered Bestmont her photos for \$3,000 each to be used in its marketing materials. Bestmont rejected Ms. Rer’s proposal, warning her that she was infringing its copyright. Bestmont believed the Original and Filters Photos had no copyright. Instead, Bestmont believed the copyright was in the hotel designs and marquee. On this basis, Bestmont asked Ms. Rer to destroy all copies of the photos and did not return Ms. Rer’s package of photos. Using a different software than Ms. Rer, Bestmont applied 11 popular filters to the Original Photos of its copyrighted design. Acting on its presumed rights, Bestmont displayed the Original Photos and its own filtered photos in its hotels. Bestmont removed all photos after Ms. Rer began her copyright action, despite maintaining that it could reproduce its own copyright.⁸

3. Procedural History

9. The Trial Court of Canada Intellectual Property Division (“TCCIP”) held that Bestmont’s copyright did not allow it to reproduce Ms. Rer’s photos. Lodge J further found copyright in each of the ten Original and 40 Filtered Photos. Having found 50 separate acts of infringement, Lodge J awarded the maximum statutory damage award of \$20,000 per work. The TCCIP also awarded punitive damages of \$500,000, resulting in a total award of \$1,500,000.⁹

10. Bestmont appealed the TCCIP’s findings. The CAIP allowed the appeal and dismissed the action. Lobi JA found that Ms. Rer had no infringement claims as Bestmont owned the copyright in its hotel designs and marquee. Lobi JA also held that the TCCIP erred in using s 32.2(1)(b) to conclude that the photographs were derivative works. Instead, the CAIP found that s 32.2(1)(b)

⁷ *Ibid* at paras 3-5.

⁸ *Ibid* at paras 6-9.

⁹ *Ibid* at paras 18, 20.

was a defence that could not be its own cause for a claim. Accordingly, s 32.2(1)(b) did not allow Ms. Rer to assert copyright against others, especially against Bestmont, the owner of the underlying work. The CAIP also held that there was no originality in the Original and Filtered Photos. Bestmont's use of filters also did not amount to a substantial reproduction of the Original or Filtered photographs because Bestmont merely reproduced their own copyright.¹⁰

11. Lobi JA also found that the TCCIP erred on damages. Punitive damages could not be awarded as they were not pled. Lobi JA further held that Bestmont used the photographs non-commercially. As statutory damages are primarily meant to be compensatory and Bestmont did not act in bad faith, the award was grossly disproportionate to the infringement. The CAIP would have awarded Ms. Rer \$3,000 for each of the ten Original Photos for a total of \$30,000, with a reduction to \$15,000, based on s 38.1(3), since the photos were in the same medium.¹¹

PART III – POINTS IN ISSUE

12. The present appeal raises three issues:

1. Are the Original Photos, Filtered Photos and the Façades project copyright protected?
2. Even if the works are protected, did Bestmont infringe Ms. Rer's copyright?
3. Is Ms. Rer entitled to statutory and punitive damages? If so, in what amount?

PART IV – ARGUMENTS IN BRIEF

1. There is no originality in Ms. Rer's works

13. Copyright protects the expression of ideas and not the ideas themselves.¹² A work must be fixed in material form to attract copyright protection.¹³ Subsection 5(1) of the *Act* states that

¹⁰ *Bestmont v Wanda Rer*, 2021 CAIP 333 at paras 1-3, 5 [*Wanda Appeal*].

¹¹ *Ibid* at paras 6-9.

¹² *CCH*, *supra* note 3 at para 8.

¹³ *Ibid*.

copyright shall subsist in every *original* artistic work.¹⁴ An original work is the expression of an idea through the exercise of skill and judgment that is “not so trivial to be a mechanical exercise”. Skill is understood as “the use of one’s knowledge, developed or practiced ability in producing the work”. Judgment is the “use of one’s capacity for discernments or ability to form an opinion or evaluation by comparing different possible options in producing the work”.¹⁵

i. Ms. Rer did not exercise sufficient skill and judgment in the Original Photos

14. Ms. Rer did not exercise sufficient skill and judgment in the Original Photos. Each photo was taken as a mechanical exercise. While *Trader Corp v CarGurus, Inc* (“*Trader*”) establishes that following a standardized procedure does not reduce the exercise of taking photos to a mechanical exercise, the procedure in *Trader* can be distinguished from Ms. Rer’s procedure.¹⁶ The Court in *Trader* found that the photographers hired by the company exercised skill and judgment in “selecting among the various options for taking photographs, taking into account variables such as the subject matter, angles, staging and framing”¹⁷ Thus, the procedure needed to take the photos required the exercise of skill and judgment. Ms. Rer’s procedure, on the other hand, merely involves standing 100 feet away from the hotel’s exterior.¹⁸ Unlike the procedure in *Trader*, it does not take training to learn Ms. Rer’s procedure. Anyone could stand 100 feet away from the hotel and take a photo with minimal instruction or practice.

15. Originality may be found in photographs through “the choice, the arrangement and the post of the subject, the choice of the angle of view and the lighting, finally by the artistic work and the

¹⁴ *Act*, *supra* note 1 at s 5(1).

¹⁵ *CCH*, *supra* note 3 at para 16.

¹⁶ *Trader Corp v CarGurus, Inc*, 2017 ONSC 1841 at para 24.

¹⁷ *Ibid* at para 23.

¹⁸ *Wanda Trial*, *supra* note 6 at para 4.

personal effort of the photographer”.¹⁹ Ms. Rer’s procedure does not consider these elements. Ms. Rer simply selected Bestmont’s copyrighted subject matter and the distance from which to capture the image. The subjects of these photos were already arranged and posed. There is no evidence Ms. Rer considered the time of day nor had any forethought that contributed to the aesthetics of the photo. Ms. Rer used common conventions of photography such as centering the subject. Aside from the distance, all the elements of the photos which might make them original were coincidental and a result of Bestmont’s architecture- not Ms. Rer’s skill and judgment.

16. The labour Ms. Rer exerted to take the photos was a mere mechanical exercise. The SCC has explicitly moved away from the “sweat of the brow” originality standard, which is based on the idea that “an author deserves his or her efforts in producing a work rewarded”.²⁰ In adopting skill and judgment as a fair and workable standard, the Court rejected the “sweat of brow approach” as being too low of a standard. Ms. Rer’s works is inconsistent with the current Canadian standard for originality. Ms. Rer should not be granted copyright protection for her life plus 50 years just because she laboured in taking the photos.

ii. Ms. Rer did not exercise sufficient skill and judgment in the Filtered Photos

17. Copyright does not subsist in the Filtered Photos. Copyright “does not give the author a monopoly over ideas or elements from the public domain, which all are free to draw upon for their own works.”²¹ The merger doctrine provides that if an idea can be expressed in only one or a limited number of ways, then copyright of that expression should be refused, for it would give the originator of the idea a virtual monopoly on the idea itself.²² The idea of using publicly available

¹⁹ *Ateliers Tango Argentin Inc c Festival d’Espagne & d’Amerique Latine*, [1997] RJQ 3030, 84 CPR (3d) 56 (QCCS) at para 39.

²⁰ *CCH*, *supra* note 3 at para 15.

²¹ *Cinar Corporation v Robinson*, 2013 SCC 73 at para 23 [*Cinar*]. See also *CCH*, *supra* note 3 at para 8.

²² *Delrina Corp v Triolet Systems Inc* (2002), 58 OR (3d) 339, 17 CPR (4th) 289 (CA) at para 48.

filters on photos of the hotel designs and marquee can only be expressed in a limited number of ways. Giving Ms. Rer’s Filtered Photos copyright would effectively prevent other creators from drawing on the idea of applying filters to photos of the hotel’s exterior. Accordingly, the Filtered Photos should not be copyrightable.

18. Ms. Rer’s selection and application of filters was a mechanical exercise. In *Pyrrha Design Inc v Plum and Posey Inc*, the Federal Court found that the plaintiff’s selection of nine wax seals to use out of 300-400 seals did not have sufficient skill and judgment and was too closely aligned with an attempt to copyright an idea.²³ Similarly, Ms. Rer did not exercise sufficient skill and judgment in *selecting* the filters to use. While Ms. Rer may allegedly have her pulse on “millennial style”,²⁴ her choice of filters was not based on independent skill and judgment as a self-described photographer or influencer. Instead, her choice was informed by the most popular filters on a popular social media platform.²⁵ In selecting four popular filters Ms. Rer exercised, at best, a trivial amount of skill and judgment insufficient for originality.

19. Additionally, Ms. Rer exercised no skill and judgment in *applying* the filters. In *Goldi Productions Ltd v Bunch* (“*Goldi*”), the plaintiff, Goldi, placed photos into a computer software which then automatically restored the photos. The Court held that Goldi did not exercise sufficient skill and judgment in altering the photos.²⁶ Similarly, Ms. Rer’s process of filter application was automated akin to the situation in *Goldi*. Accordingly, like Goldi, Ms. Rer did not exercise skill and judgment in creating the Filtered Photos.

20. Ms. Rer’s case is distinguishable from *Capitale en fête inc c Ouellet*, where it was found that the photographer exercised sufficient skill and judgment in cropping photos by choosing the

²³ *Pyrrha Design Inc v Plum and Posey Inc*, 2019 FC 129 at para 108 [*Pyrrha*].

²⁴ *Wanda Trial*, *supra* note 6 at para 1.

²⁵ *Ibid* at para 5.

²⁶ *Goldi Productions Ltd v Bunch* (1 August 2018), Brampton 15-5800 (ON Sm Cl Ct) at para 16.

software and applying the appropriate tools.²⁷ In contrast, Ms. Rer did not exercise sufficient skill and judgment in filter application, as the application was completely computer controlled.

21. Like cropping, filter use may qualify as an exercise of sufficient skill and judgment when it is coupled with the various choices in photo editing.²⁸ However, Ms. Rer did not engage in photo editing, she only applied filters. A filter merely tweaks the appearance of a photo, similar to how a font change alters the appearance of text. *CCH Canadian Ltd v Law Society of Upper Canada* (“*CCH*”) deemed the changing of a font to be too trivial to merit protection as an original work.²⁹ Accordingly, the application of a filter is too trivial. The Filtered Photos do not have originality.

22. Filter usage is ubiquitous in the current digital climate.³⁰ As a matter of public policy, the balance of interests in copyright law would be perversely skewed if the mere application of filters is sufficient to warrant protection.³¹ This outcome would effectively mean that anyone could obtain copyright in an unoriginal photo by simply applying a filter.

iii. There is no originality in the Compilation

23. The collection of Original and Filtered Photos cannot be considered a “Compilation”. The TCCIP did not address originality in the Compilation despite finding originality in both the Original and Filtered Photos. The CAIP found no originality in either but articulated in *obiter* the possibility of originality in the Compilation.

24. There is no originality in the Compilation because there was no skill and judgment exercised in either its selection or arrangement.³² Selection is the exercise of skill and judgment to

²⁷ *Capitale en fête inc c Ouellet*, 2019 QCCQ 2607 at para 58.

²⁸ *Temple Island Collections Ltd v New English Teas Ltd*, [2012] EWPC 1.

²⁹ *CCH*, *supra* note 3 at para 16.

³⁰ *Wanda Trial*, *supra* note 6 at para 5.

³¹ *Théberge*, *supra* note 2 at para 30.

³² *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).

choose *what* goes into a compilation. Arrangement “refers to the ordering or grouping...that go beyond the mere mechanical grouping of data”.³³ Ms. Rer photographed all ten of Bestmont’s hotels and selected *all* the photos she took with no consideration for their ordering or grouping. The author of a work is the first owner of the copyright.³⁴ Since Ms. Rer did not exercise sufficient skill and judgment, she cannot be considered the first owner of the Original Photos, Filtered Photos or Compilation. Thus, she has no copyright claim.

iv. Subparagraph 32.2(1)(b)(i) can only be used as a shield and not as a sword

25. In taking photos of Bestmont’s copyrighted works, Ms. Rer is copying its creations. Subparagraph 32.2(1)(b)(i) provides that “it is not an infringement of copyright (b) for any person to reproduce, in a...photograph...(i) an architectural work”.³⁵ The provision is phrased negatively, it only excuses what would otherwise be an infringement. It does not confer rights to assert copyright against others. Ms. Rer is using this provision as a sword, rather than a shield.

26. Allowing Ms. Rer to exercise copyright in her photos would effectively allow a creator of a derivative work to control how a copyright owner chooses to reproduce its underlying work. As stated by the CAIP, “the doctrine of derivative works is a foreign principal that has but a toehold in Canada”.³⁶ If this doctrine exists in Canada, it is in the s 3(1) rights of the owner, which is Bestmont.³⁷ *Théberge v Galerie d’Art du Petit Champlain inc.* (“*Théberge*”) holds that s 3(1) “confers on artists and authors the exclusive right to control the preparation of derivative works”.³⁸

³³ 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.

³⁴ *Act, supra* note 1 at s 13(1).

³⁵ *Ibid* at s 32.2(1)(b)(i).

³⁶ *Wanda Appeal, supra* note 10 at para 3.

³⁷ *Act, supra* note 1 at s 3(1).

³⁸ *Théberge, supra* note 2 at para 73.

Any further expansion of the doctrine into Canadian law lies with Parliament, and not the courts.³⁹ Parliament has not expanded this doctrine in the 20 years since *Théberge*. In the absence of such a doctrine, Ms. Rer cannot assert copyright against Bestmont, the original owner.

v. *Bestmont was exercising its s 3(1) rights by displaying the Original Photos*

27. Section 3 of the *Act* grants the owner of copyright in a work the sole right to reproduce the work or any substantial part thereof in any material form whatever.⁴⁰ As a copyright owner in both the marquee and hotel designs, Bestmont has the right to reproduce them in any material form, including in photographs.⁴¹ Ms. Rer thus has no claim against Bestmont.

2. Bestmont did not infringe Ms. Rer's works

28. Since Ms. Rer's works are not original and they cannot be characterized as derivatives, Bestmont could not have infringed any copyright. Per s 27(1), it is an infringement for any person to do, without the consent of the owner of the copyright, anything that by the *Act* only the owner of the copyright can do.⁴² This includes the right to produce or reproduce the work or any substantial part thereof in any material form whatever.⁴³ Copyright does not give "the author a monopoly over ideas or elements from the public domain"⁴⁴ as only expression is protected.⁴⁵ Reproduction has been interpreted to mean copying, it does not include cases where an author produces a substantially similar result by independent work without copying.⁴⁶ Independent creation derived from a conventional idea, or a common source does not infringe copyright.⁴⁷

³⁹ *Ibid.*

⁴⁰ *Act*, *supra* note 1 at s 3(1).

⁴¹ *Ibid* at s 3(1).

⁴² *Ibid* at s 27(1).

⁴³ *Ibid* at s 3(1).

⁴⁴ *Cinar*, *supra* note 21 at para 23.

⁴⁵ *Prism Hospital Software Inc v Hospital Medical Records Institute*, [1994] 10 WWR 305, 57 CPR (3d) 129 (BCSC) at para 629.

⁴⁶ *Ladbroke (Football), Ltd v William Hill (Football) Ltd*, [1964] 1 WLR 273, [1964] 1 All ER 465 (HL).

⁴⁷ *Philip Morris Products SA v Marlboro Canada Ltd*, 2010 FC 1099 at para 320 (aff'd 2012 FCA 201).

29. To establish infringement, the plaintiff must establish the reasonable possibility of access to the copyrighted work and sufficient similarity with the defendant's work.⁴⁸

i. Access and sufficient similarity

30. Though Bestmont had access to electronic copies of Ms. Rer photos, Ms. Rer must establish that there is sufficient similarity between a substantial part of the Filtered Photos and Bestmont's filtered photos. The question of "substantial part" is assessed by looking holistically and qualitatively at the copyrighted work and the allegedly infringing work.⁴⁹ The *Act* does not protect every "particle" of an original work.⁵⁰ An infringing work will have copied a "substantial part" where it has recreated a substantial portion of the author's originality.⁵¹

ii. Bestmont's filtered photos arose independently from the use of common techniques

31. On a holistic view, there is similarity between Bestmont's filtered photos and Ms. Rer's Filtered Photos. However, the similarities between the photos arise mainly from the appearance of the hotel designs and marquee. These similarities are not a substantial part of Ms. Rer's originality, rather they arise from Bestmont's originality in its hotel designs and marquee. Furthermore, similarities also arise because of the common technique of filtering. Common and conventional techniques are not capable of copyright protection.⁵² Since the application of filters is merely a common technique, Bestmont did not infringe the copyright in the Filtered Photos.

32. If the Filtered Photos are found to be original, Ms. Rer's choice of filters was arguably informed more by the popularity rather than the aesthetic of the filters, as she attempted to appeal to her "substantial social media following".⁵³ Form follows function, the filters were selected to

⁴⁸ *Ibid* at para 315.

⁴⁹ *Cinar*, *supra* note 21 at para 35.

⁵⁰ *Ibid* at para 25.

⁵¹ *Ibid* at para 26.

⁵² *Rains v Molea*, 2013 ONSC 5016 at para 30.

⁵³ *Wanda Trial*, *supra* note 6 at para 1.

appeal to the masses. This explains Bestmont's independent use of similar filters. Moreover, the simpler the copyrighted work, the greater the need to establish exact copying for a finding of infringement.⁵⁴ Since the Filtered Photos are simple, Ms. Rer must establish exact copying. Importantly, Bestmont did not use the same software as Ms. Rer to filter its photos. Since there is no exact copying, there is no infringement.

iii. Bestmont did not infringe Ms. Rer's Compilation

33. In the alternative, even if the Court finds originality in the Compilation, Bestmont did not infringe it. Bestmont did not reproduce a substantial part of Ms. Rer's originality in selecting or arranging the Compilation. Even if Ms. Rer exercised skill and judgment in the selection of the Filtered Photos alongside the Original Photos, Bestmont did not reproduce this selection as it did not display any of the Filtered Photos. Bestmont independently included its own filtered photos using 11 popular filters from a different photo editing software in its compilation.⁵⁵

34. Ms. Rer did not arrange the Compilation in a particular way, so there was nothing for Bestmont to reproduce. Bestmont exercised its own skill and judgment in arranging and displaying its photos throughout its hotels. As Bestmont did not substantially reproduce the selection or the arrangement of the Compilation, it did not infringe Ms. Rer's copyright.

3. If statutory damages are awarded, it should be the lowest quantum

35. As the photos were neither original nor infringed, Ms. Rer is not entitled to any damages. However, if the Court finds that Bestmont infringed the Original Photos, damages should be limited to \$100 total because the alleged infringements were for non-commercial purposes.⁵⁶ Alternatively, if the Court finds Bestmont's infringement to be for a commercial purpose, damages

⁵⁴ *Pyrha*, *supra* note 23 at para 123.

⁵⁵ *Wanda Trial*, *supra* note 6 at para 8.

⁵⁶ *Act*, *supra* note 1 at s 38.1(1)(b).

should be below \$200 per work.⁵⁷ Punitive damages should not be awarded.

i. Bestmont's display and reproduction of the photos was not for a commercial purpose

36. Paragraph 38.1(1)(b) of the *Act* provides a damages range between \$100 to \$5,000, with respect to *all* infringements for *all* works, if made for non-commercial purposes.⁵⁸ Although the *Act* does not define “commercial purpose”, courts have interpreted it to mean a view to profit; *indicia* have been limited to sale and advertisement.⁵⁹ Bestmont did neither.

37. Bestmont never sold the photos. It merely displayed them in its hotels. This display was also not for marketing.⁶⁰ First, the photos did not highlight the quality of Bestmont's lodging experience nor the superiority of its services over those offered by its competitors. Second, the photos were displayed *inside* the hotels. The access was mostly limited to paid guests, making it an inefficient marketing tactic to attract new guests.

38. At most, the photos were a small part of Bestmont's decoration. Bestmont's attraction is its marquees and reputation as a luxury hotel chain. It is Bestmont's reputation, *not* the photos that encourage word-of-mouth referrals and repeated stays. There was no evidence that Bestmont generated any revenue or business advantage from the display.⁶¹ The CAIP concluded that “[w]ithout any discernible benefit to Bestmont's business, public display is insufficient for a finding that infringement was of a commercial nature.”⁶² This reasoning should be upheld.

⁵⁷ *Act*, *supra* note 1 at ss 38.1(1)(a), 38.1(2), 38.1(3).

⁵⁸ *Act*, *supra* note 1 at s 38.1(1)(b).

⁵⁹ See *Royal Conservatory Music v MacIntosh*, 2016 FC 929 at para 111. See also *Young v Thakur*, 2019 FC 835 at para 45. See also *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2020 FC 794 at para 3 [*Rallysport*].

⁶⁰ *Wanda Trial*, *supra* note 6 at para 8.

⁶¹ *Wanda Appeal*, *supra* note 10 at para 7.

⁶² *Ibid.*

ii. *The circumstances warrant the lowest quantum of statutory damages*

39. Paragraphs 38.1(5)(a), (b), (c), (d) of the *Act* are factors that a court must consider when awarding damages.⁶³ A court should also consider whether the damages would be grossly out of proportion to the infringement.⁶⁴ Here, each factor favours the lowest quantum of damages.

A. Paragraph 38.1(5)(a): Bestmont acted in good faith

40. Bestmont acted in good faith, suggesting that the lowest quantum of damages should be awarded. An infringement made with a sincere belief in the ownership of the copyright is one done in good faith.⁶⁵ Bestmont sincerely believed that its underlying copyright allowed it to display the photos. This was a reasonable interpretation, shared by the CAIP.⁶⁶

41. During the proposal, Bestmont believed that Ms. Rer attempted to profit from its underlying copyright. Consequently, Bestmont requested she destroy copies of the photos, to protect its marquees from appropriation. Since Bestmont is readily recognized by its marquees, any appropriation can tarnish its reputation and harm its business. Bestmont also denied her request to remove the displayed photos, as from its perspective, Ms. Rer could not control how it chose to exercise its copyright. Moreover, a failure to act in good faith does not mean that a party acted in bad faith.⁶⁷ Bad faith is characterized by malice or dishonesty.⁶⁸ Bestmont's conduct falls well short of this. This merits the lowest statutory damage award.

B. Paragraph 38.1(5)(b): The conduct of the parties

42. As mentioned, Bestmont's conduct before the proceeding was made in good faith. After proceedings commenced, Bestmont cooperated by voluntarily taking the photos down. In contrast,

⁶³ *Act*, *supra* note 1 at s 38.1(5)(a)-(d).

⁶⁴ *Bell Canada v L3D Distributing Inc*, 2021 FCA 832 at paras 99 and 105.

⁶⁵ *Pinto v Bronfman Jewish Education Centre*, 2013 FC 945 at para 198.

⁶⁶ *Wanda Appeal*, *supra* note 10 at para 2.

⁶⁷ *Century 21 Canada Ltd Partnership v Rogers Communication Inc*, 2011 BCSC 1196 at para 408.

⁶⁸ *Rallysport*, *supra* note 59 at para 10. See also *Central Credit Union v Lewis*, 2014 PECA 1 at para 72.

Ms. Rer’s claim for maximum statutory damages was unreasonable since the alleged infringement was insubstantial and limited in time. It did not interfere with Ms. Rer’s ability to make a living. Thus, the court should award Ms. Rer the lowest quantum of damages.

C. Paragraph 38.1(5)(c): There is no need to deter other infringements

43. The power imbalance between artists and corporations is a legitimate public policy concern. However, this is only a concern when it leads to corporations *knowingly* exploiting the rights of artists by infringing their *protected* works. Since Bestmont’s display and reproduction of the photos were made in good faith, it fails to meet this standard.

44. Categorizing this case as exploitation, unfairly punishes Bestmont and leads to a chilling effect on licensing negotiations between artists and corporations. Corporations will hesitate to partner with artists if failed negotiations can result in lawsuits. This only hurts artists by diminishing the number of available opportunities. The Court should not give credence to Ms. Rer’s selfish desire to punish Bestmont and should award the lowest statutory damages.

D. Paragraph 38.1(5)(d): Non-commercial purposes

45. For non-commercial purposes, the award must be proportionate to the infringement. That is, a court must consider the hardship the award may cause the defendant, whether the infringements were for private purposes, and the impact of the infringements on the plaintiff.⁶⁹

46. Normally, Bestmont may not suffer hardship from paying higher damages. However, the toll of the pandemic has placed hotels, like Bestmont, in dire financial straits. Paying damages not only depletes its revenue but will also cause reputational harm. Bestmont will be known as a “big bad corporation”, resulting in potential guest boycotts, consequently reducing profits.

⁶⁹ *Act, supra* note 1 at s 38.1(5)(d).

47. Although the infringement was not for a private purpose, there is no evidence of monetary harm to Ms. Rer. Her ability to make a living was unaffected. As the sole occupier of the market and the only potential buyer, Bestmont *exclusively* determined the market value of the photos, not Ms. Rer. Upon its rejection of the proposed licensing, Bestmont determined that the photos had no commercial value. Since this determination happened before the alleged infringement, no potential monetary harm can be attributed to the infringement.

48. Even if Ms. Rer had other buyers, the infringement did not preclude her from selling to them if she so desired. Bestmont was not a competitor and did not sell the photos or use them on social media. The infringement was not prejudicial to Ms. Rer. There is no evidence that it harmed her reputation or affected the demand for her services.

E. A high quantum of damages is grossly disproportionate to the infringement

49. Statutory damages greater than \$100 would be grossly out of proportion to the alleged infringement. Proportionality requires a court to assess evidence of the defendant's revenue and profits.⁷⁰ Bestmont did not gain any additional revenue at Ms. Rer's expense.⁷¹ From a financial perspective, both parties remained unaffected. The alleged infringement was an isolated incident that did not persist over a lengthy period. More importantly, the infringement rose from Bestmont's *reasonable* understanding of the law. Bestmont should not be punished for any ambiguity in the law, especially when the CAIP shared the same interpretation.⁷²

iii. If statutory damages are assessed under s 38.1(1)(a), they should be reduced

50. Statutory damages under s 38.1(1)(a) are in the range of \$500 to \$20,000 for *each* work.⁷³ If the alleged infringements are for a commercial purpose and assessed under s 38.1(1)(a), the

⁷⁰ *Nintendo of America Inc v King*, 2017 FC 246 at para 149.

⁷¹ *Wanda Appeal*, *supra* note 10 at para 7.

⁷² *Ibid* at para 2.

⁷³ *Act*, *supra* note 1 at s 38.1(1)(a).

damages should be reduced under ss 38.1(2) and 38.1(3) to below \$200 per work.

51. Subsection 38.1(2) allows a court to reduce damages to \$200 to \$500 per work, when the defendant was unaware and had no reasonable grounds to believe that it had infringed the copyright.⁷⁴ Bestmont was unaware of any infringement because of its own copyright.⁷⁵

52. The Court also has discretion to further reduce the statutory damages under s 38.1(3), if there is (a) more than one work in a single medium and (b) awarding even the minimum amount is grossly out of proportion to the infringement.⁷⁶ Both conditions apply in this case. Therefore, if damages are measured under s 38.1(1)(a), it should be below \$200 per infringement.

iv. Punitive damages should not be awarded against Bestmont

53. The CAIP correctly recognized that punitive damages are inappropriate in this case.⁷⁷ In *Whiten v Pilot Insurance Co*, the SCC held that punitive damages must be pled.⁷⁸ Since Ms. Rer did not plead punitive damages, she is not entitled to them because it would catch Bestmont by surprise. It would be unfair for someone to be punished without an opportunity to consider the scope of her jeopardy and respond accordingly.⁷⁹

54. Punitive damages are only awarded against a defendant in *exceptional* cases for “malicious, oppressive and high-handed misconduct that offends the court’s sense of decency”.⁸⁰ This is a high standard that applies only when other damages are insufficient.⁸¹ Whether the conduct of the defendant rises to this standard involves the following considerations: (i) whether the action was planned or deliberate, (ii) the defendant’s awareness that its behaviour was wrong, (iii) the

⁷⁴ *Act*, *supra* note 1 at s 38.1(2).

⁷⁵ *Wanda Appeal*, *supra* note 10 at para 2.

⁷⁶ *Act*, *supra* note 1 at s 38.1(3).

⁷⁷ *Wanda Appeal*, *supra* note 10 at para 8.

⁷⁸ *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 86 [*Whiten*].

⁷⁹ *Ibid.* See also *Bimman v Neiman*, 2017 ONCA 264 at para 92.

⁸⁰ *Whiten*, *supra* note 78 at para 36.

⁸¹ *Rallysport*, *supra* note 59 at para 45.

motivation of the defendant (iv) whether the defendant persisted in the outrageous conduct over a length of time, (v) whether the defendant concealed or attempted to conceal the conduct, and (vi) did the defendant profit from misconduct.⁸²

55. Bestmont's display and reproduction of the photos was planned and deliberate, insofar as it was exercising what it believed to be its copyright. As such, Bestmont did not have awareness that its behavior was wrong. It was motivated by its interpretation of the law. Whether this interpretation is correct is irrelevant. Bestmont need only sincerely believe its interpretation, which it did. Even if it misinterpreted the law, honest mistakes should not be punished.

56. Furthermore, Bestmont's infringement was limited in time. In *Profekta International Inc v Lee*, the defendant, Lee, was forced to pay \$10,000 in punitive damages for continuing to infringe even after a criminal conviction and a cease and desist.⁸³ Unlike Lee, Bestmont removed the photos before trial. Lee's behavior was significantly more egregious and yet the Court in that case only awarded \$10,000 in punitive damages. Awarding \$500,000 against Bestmont would be throwing the book at Bestmont.⁸⁴ There is no evidence that Bestmont attempted to conceal the infringement or profited from the conduct.⁸⁵ Awarding punitive damages unduly punishes Bestmont for what was merely a failed negotiation attempt.

4. Holding Bestmont liable violates the purpose of the Act

57. *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".⁸⁶ The SCC stressed that the proper balance rests not merely in

⁸² *Whiten*, *supra* note 78 at para 113. See also *Collett v Northland Art Company Canada Inc*, 2018 FC 269 at para 72.

⁸³ *Profekta International Inc v Lee* (1997), 214 NR 309, 75 CPR (3d) 369 (FCA).

⁸⁴ *Wanda Appeal*, *supra* note 10 at para 8.

⁸⁵ *Ibid* at para 7.

⁸⁶ *Théberge*, *supra* note 2 at para 30.

recognizing the rights of creators, but “in giving due weight to their limited nature”.⁸⁷ Overcompensation of creators would “unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society”.⁸⁸ Finding for Ms. Rer would overcompensate her financially and unduly expand the scope of her rights.

58. Finding that Ms. Rer’s photos are copyrightable lowers the standard of originality to a level that endangers the maintenance of a robust public domain. *CCH* states that requiring the exercise of skill and judgment safeguards against the overcompensation of creators.⁸⁹ This ensures that the public domain flourishes as “others are able to produce new works by building on the ideas and information contained in the works of others”.⁹⁰

59. *CCH* affirmed for the first time that “the public interest in promoting the encouragement and dissemination of works of the arts and intellect” is a relevant consideration in the determination of originality.⁹¹ As Carys J. Craig argues, the *CCH* ruling represents how copyright law in Canada has “evolved from a right solely for the benefit of authors into a system for achieving a balance between authors’ rights and the public interest”.⁹² Finding for Ms. Rer would depart from the jurisprudence by lowering the standard required for copyrightable works.

60. Additionally, finding that Ms. Rer’s works are copyrightable expands copyright protection to ideas as opposed to their expression. The idea/expression dichotomy is based on the equality of authors, a plaintiff’s right to her expression is limited by the requirement that it be consistent with the defendant’s equal right to her own original expression.⁹³ The scope of the plaintiff’s right is

⁸⁷ *Ibid* at para 31.

⁸⁸ *Ibid* at para 32.

⁸⁹ *CCH*, *supra* note 3 at para 23.

⁹⁰ *Ibid* at para 23.

⁹¹ *Ibid*.

⁹² Carys J Craig, “The Evolution of Originality in Canadian Copyright Law: Authorship, Reward, and the Public Interest” (2005) 2:2 U Ottawa JL & T at 430.

⁹³ Abraham Drassinower, “A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law” (2003) 16 Can JL & Jur at 13-14.

defined from the standpoint of other equal authors.⁹⁴

61. Bestmont is, at the very least, as much a creator as Ms. Rer. Her rights as a creator allowed her to recreate Bestmont's copyrighted marquee and architecture in her photos without infringing, only by way of a statutory exception. This is, however, the limit of her right. Ms. Rer cannot turn around and sue Bestmont, the original creator, for infringement.

62. If copyright were to protect an author's ideas, it would limit the ability of other authors to express those ideas. This would allow authors to monopolize ideas at great cost to the public domain. Such a finding would ignore the fact that different authors can express the same idea in different and independent ways. Allowing copyright in the Filtered Photos would monopolize the abstract idea of applying filters to photos of Bestmont's architecture.

63. Protecting the Original Photos, the Filtered Photos, or the Compilation, would essentially reward copiers who attempt to use a statutory exemption as a sword against rightful owners. The CAIP's decision is consistent with the fundamental objectives of copyright law. Finding for Bestmont strikes the correct balance between recognizing the rights of creators and maintaining a robust public domain. Such a decision would be a victory for users and owners alike.

PART V – ORDER REQUESTED

64. The Respondent respectfully requests this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 28th day of January, 2022.

Team No. 7

Counsel for the Respondent

⁹⁴ *Ibid* at 10.

PART VI – TABLE OF AUTHORITIES

AUTHORITY	Pinpoint
LEGISLATION	
<i>Copyright Act</i> , RSC 1985, c C-42.	ss 3(1), 5(1), 13(1), 27(1), 32.2(1)(b), 38.1(1)(a), 38.1(1)(b), 38.1(2), 38.1(3), 38.1(5)(a)-(d)
JURISPRUDENCE	
<i>Ateliers Tango Argentin Inc c Festival d’Espagne & d’Amerique Latine</i> , [1997] RJQ 3030, 84 CPR (3d) 56 (QCCS).	39
<i>Bell Canada v L3D Distributing Inc</i> , 2021 FCA 832.	99, 105
<i>Bestmont v Wanda Rer</i> , 2021 CAIP 333.	1, 2, 3, 5, 6, 7, 8, 9
<i>Bimman v Neiman</i> , 2017 ONCA 264.	92
<i>Capitale en fête inc c Ouellet</i> , 2019 QCCQ 2607.	58
<i>CCH Canadian Ltd v Law Society of Upper Canada</i> , 2004 SCC 13.	8, 15, 16, 23
<i>Central Credit Union v Lewis</i> , 2014 PECA 1.	72
<i>Century 21 Canada Ltd Partnership v Rogers Communication Inc</i> , 2011 BCSC 1196.	408
<i>Cinar Corporation v Robinson</i> , 2013 SCC 73.	23, 35
<i>Collett v Northland Art Company Canada Inc</i> , 2018 FC 269.	72
<i>Delrina Corp v Triolet Systems Inc</i> (2002), 58 OR (3d) 339, 17 CPR (4th) 289 (CA).	48
<i>Goldi Productions Limited. v Bunch</i> (1 August 2018), Brampton 15-5800 (ON Sm Cl Ct).	16
<i>Key Publications, Inc v Chinatown Today Pub Enterprises, Inc</i> , 945 F.2d 509 (2nd Circ 1991).	
<i>Ladbroke (Football), Ltd v William Hill (Football) Ltd</i> , [1964] 1 WLR 273, [1964] 1 All ER 465 (HL).	
<i>Nintendo of America Inc v King</i> , 2017 FC 246.	149
<i>Philip Morris Products SA v Marlboro Canada Ltd</i> , 2010 FC 1099.	315, 320
<i>Pinto v Bronfman Jewish Education Centre</i> , 2013 FC 945.	198
<i>Prism Hospital Software Inc v Hospital Medical Records Institute</i> , [1994] 10 WWR 305, 57 CPR (3d) 129 (BCSC).	629
<i>Profekta International Inc v Lee</i> (1997), 214 NR 309, 75 CPR (3d) 369 FCA.	
<i>Pyrrha Design Inc v Plum and Posey Inc</i> , 2019 FC 129.	108, 123
<i>Rains v Molea</i> , 2013 ONSC 5016.	30
<i>Rallysport Direct LLC v 2424508 Ontario Ltd</i> , 2020 FC 794.	3, 10, 45
<i>Royal Conservatory Music v MacIntosh</i> 2016 FC 929.	111
<i>Slumber-Magic Adjustable Bed Co v Sleep-King Adjustable Bed Co</i> (1984), [1985] 1 WWR 112, 3 CPR (3d) 81 (BCSC).	
<i>Temple Island Collections Ltd v New English Teas Ltd</i> , [2012] EWPC 1.	
<i>Théberge v Galerie d’Art du Petit Champlain Inc</i> , 2002 SCC 34.	30, 73
<i>Trader Corp v CarGurus, Inc</i> , 2017 ONSC 1841.	23, 24
<i>Wanda Rer v Bestmont Hotels</i> , 21 TCCIP 1222.	1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 18, 20
<i>Whiten v Pilot Insurance Co</i> , 2002 SCC 18.	36, 86, 113
<i>Young v Thakur</i> 2019 FC 835.	45

SECONDARY SOURCES	
Abraham Drassinower, "A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law" (2003) 16 Can JL & Jur.	10, 13, 14
Carys J Craig, "The Evolution of Originality in Canadian Copyright Law: Authorship, Reward, and the Public Interest" (2005) 2:2 U Ottawa JL & T.	430
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