

**THE SUPREME MOOT COURT OF INTELLECTUAL PROPERTY**

B E T W E E N:

**WANDA RER**

(Appellant)

And

**BESTMONT HOTELS**

(Respondent)

**FACTUM FOR RESPONDENT**

(2021-2022 Harold G. Fox Intellectual Property Moot)

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## **PART I: OVERVIEW**

[1] The Appellant, Wanda Rer (“**Ms. Rer**”), is seeking \$1,500,000 from the Respondent, Bestmont Hotels (“**Bestmont**”) for decorating their hotels with photographs of Bestmont Hotel exteriors. The Appellant is being awarded \$500,000 in un-pleaded punitive damages. This appeal should be dismissed for three reasons.

[2] First, the Appellant seeks to enforce copyright in photographs that are the unoriginal product of a mechanical exercise. Ms. Rer positioned her camera 100 feet away from Bestmont’s hotels and took pictures. This exact positioning was re-used nine times without the application of additional skill or judgment. Only one photograph taken by the Appellant possessed the necessary skill and judgment to be considered original.

[3] Second, it cannot be rightfully established that Bestmont’s photos were substantially similar to Ms. Rer’s. The degree of similarity between Ms. Rer’s works and Bestmont’s displayed photos is unsubstantiated. Regardless, as set out in section 3(1) of the *Copyright Act*, Bestmont is immune from claims of copyright infringement due to their copyright in the underlying work.

[4] Finally, the Court of Appeal was correct in finding that the damages sought by Ms. Rer exceed the statutory thresholds. The law is clear that non-commercial-use statutory damages can vary from \$100 to \$5000.<sup>1</sup> As there is only one potential original work, if this Court finds copyright infringement, the maximum quantum of damages is \$5000. The discretionary award of \$500,000 is inappropriate, and punitive damages that were not pleaded should not be awarded.

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<sup>1</sup> *Copyright Act*, RSC, c C-42 at s 38.1(1)(b) [*Copyright Act*].

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

[5] Bestmont is a reputable Canadian hotel chain.<sup>2</sup> Ms. Rer is a photographer and self-described social media influencer who frequented Bestmont’s hotels in recent years.<sup>3</sup>

[6] Without consulting Bestmont, Ms. Rer photographed ten Bestmont Hotel marquees to produce ten “**Original Photos.**”<sup>4</sup> She then applied four generic filters from a popular social media platform onto the Original Photos to create 40 “**Filtered Photos.**”<sup>5</sup> Together, the Filtered and Original Photos are called “**Façades.**” Following this, Ms. Rer approached Bestmont with a licensing offer at a rate of \$3,000 per photo.<sup>6</sup>

[7] The Original Photos were produced using the “exact same technique and camera set-up,” wherein Ms. Rer positioned the camera 100 feet away from the hotel.<sup>7</sup> The photographs featured Bestmont’s entrances and famous marquees within which Bestmont holds registered copyright.

[8] Bestmont did not accept Ms. Rer’s offer to license photographs of Bestmont’s own copyrighted works.<sup>8</sup>

[9] Bestmont used a separate photo editing software to apply filters to the Original Photos. The photos edited by Bestmont were used as decoration in the hotels.<sup>9</sup>

[10] Upon hearing of Bestmont’s choice in décor, Ms. Rer made one request to Bestmont to remove the photos from display. Before receiving a response, Ms. Rer commenced a claim alleging copyright infringement, seeking a permanent injunction and the highest statutory damages permissible pursuant to section 38.1 of the *Copyright Act*.<sup>10</sup>

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<sup>2</sup> *Wanda Rer v Bestmont Hotels*, 2021 TCCIP 1222 at para 2 [*Bestmont TCCIP*].

<sup>3</sup> *Bestmont TCCIP*, *supra* note 2 at paras 1, 3.

<sup>4</sup> *Bestmont TCCIP*, *supra* note 2 at para 4.

<sup>5</sup> *Bestmont TCCIP*, *supra* note 2 at paras 2, 4, 6.

<sup>6</sup> *Bestmont TCCIP*, *supra* note 2 at para 6.

<sup>7</sup> *Bestmont TCCIP*, *supra* note 2 at para 4.

<sup>8</sup> *Bestmont TCCIP*, *supra* note 2 at paras 7, 11.

<sup>9</sup> *Bestmont TCCIP*, *supra* note 2 at para 8.

<sup>10</sup> *Copyright Act*, *supra* note 1 at s 5(1).

[11] At trial, Lodge J. held that Ms. Rer’s work met the requirement for originality.<sup>11</sup> Lodge J. awarded \$20,000 in statutory damages for 50 works and an additional \$500,000 to “punish Bestmont for its reprehensible conduct,” for damages totaling \$1,500,000.<sup>12</sup>

[12] On appeal, Lobi J.A. dismissed the action, finding that Lodge J. erred in finding originality in Ms. Rer’s work. Lobi J.A. found that mechanically repeating the same photographic concept and technique at different hotels and applying social media filters does not warrant copyright protection.<sup>13</sup> Furthermore, Lobi J.A. held that Bestmont was immune from Ms. Rer’s infringement allegations as Bestmont owns the underlying copyright in the hotel and marquees. Bestmont has the sole right to produce or reproduce any material reproduction of their own work.<sup>14</sup> The Court of Appeal also decided that the doctrine of derivative works is foreign to Canadian jurisprudence and could not be relied on by Ms. Rer for a finding of infringement by Bestmont.<sup>15</sup>

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

[13] There are three issues in this appeal:

- (1) Was the Court of Appeal correct in ruling that Ms. Rer did not own copyright in the Façades project?
- (2) Was the Court of Appeal correct in finding that Bestmont did not infringe any copyright?
- (3) Was the Court of Appeal correct in minimizing the quantum of damages Ms. Rer was entitled to?

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<sup>11</sup> *Bestmont TCCIP*, supra note 2 at para 16.

<sup>12</sup> *Bestmont TCCIP*, supra note 2 at para 20.

<sup>13</sup> *Bestmont v Wanda Rer*, 2021 CAIP 333 at paras 1, 5 [*Bestmont CAIP*].

<sup>14</sup> *Bestmont CAIP*, supra note 13 at para 2.

<sup>15</sup> *Bestmont CAIP*, supra note 13 at para 5, 9.

[14] The Respondent submits that each of these questions should be answered in the affirmative, and the appeal should be dismissed.

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

##### **1) The Court of Appeal was correct in finding that the Appellant does not own copyright in the photographs**

[15] The Court of Appeal found that the Trial Court applied too low a standard for originality; “a scintilla of artistic expression.”<sup>16</sup> Lobi J.A. held that the standard for originality should not be so low as to award Ms. Rer copyright in the photographs. This finding should be upheld for three reasons: (A) the Original Photos are the product of mechanical exercise; (B) the Appellant has not established defensible copyright in the displayed filtered photos; and (C) the existence of copyright in the Façades project is irrelevant.

##### **A. The Original Photos are the product of mechanical exercise**

[16] The *Copyright Act* stipulates that copyright subsists in every original artistic work,<sup>17</sup> and photographs are artistic works.<sup>18</sup> However, copyright can only subsist in photographs if they are original.<sup>19</sup> In *CCH Canadian Ltd. v Law Society of Upper Canada*, it was established that a work is original if it is the product of the author’s exercise of skill and judgment to a non-trivial extent.<sup>20</sup> If the use of skill and judgment in the production of the work is found to be trivial, then the work is the product of a mechanical exercise and is unoriginal.<sup>21</sup> In *CCH*, mechanical exercise is exemplified as a singular change like a change to the font of a body of text. The Court therefore held that the alteration of one element of a work is inadequate to render it a separate work.<sup>22</sup>

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<sup>16</sup> *Bestmont TCCIP*, *supra* note 2 at para 15.

<sup>17</sup> *Copyright Act*, *supra* note 1 at s 5(1).

<sup>18</sup> *Copyright Act*, *supra* note 1 at s 2 “artistic work.”

<sup>19</sup> *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 at para 6 [*CCH*].

<sup>20</sup> *CCH*, *supra* note 19 at para 16.

<sup>21</sup> *CCH*, *supra* note 19 at para 16.

<sup>22</sup> *CCH*, *supra* note 19 at para 16.

[17] Ms. Rer exercised skill and judgment once. This was when she composed the first Original Photo. The only difference between the ten Original Photos was the subject matter. As the angles, staging, and framing, were all identical in the subsequent photographs, according to *CCH*, originality can only be found in the first Original Photo.

[18] In *Trader v CarGurus*, copyright was found to exist in photographs of cars taken for the purpose of advertisement.<sup>23</sup> *Trader* and *Rallysport Direct LLC v 2424508 Ontario Ltd*, two cases cited by the Appellant, collectively suggest that a photographer's selection of the compositional elements of a photograph is what constitutes an exercise of skill and judgment in photography.<sup>24</sup> Ms. Rer evaluated the possible outcomes for the photographs only once while selecting compositional elements, and then the "exact same" elements were replicated nine times to create the Original Photos.<sup>25</sup>

[19] The Respondent concedes that originality may exist in the first Original Photo. However, the remainder of the photos are the product of mechanical exercise. The alteration of only the subject matter of a work is inadequate to render it a separate work. The absence of choice and selection in any other aspect indicates that the works are insufficiently distinct, and a trivial degree of skill and judgment was used in the production of the subsequent photos. The subsequent nine Original Photos are therefore the product of a mechanical exercise.<sup>26</sup>

[20] While the Appellant repeatedly calls attention to Ms. Rer's years of experience as a photographer as evidence of her capacity for originality,<sup>27</sup> a photograph produced by a very experienced photographer is not inherently original. In *CCH*, it is clear that skill and judgment is

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<sup>23</sup> *Trader v CarGurus*, 2017 ONSC 1841 at para 24 [*Trader*].

<sup>24</sup> *Trader*, *supra* note 22 at para 24; *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2019 FC 1524 at para 10, *supra* note 23 at para 47.

<sup>25</sup> *Bestmont TCCIP*, *supra* note 2 at para 4.

<sup>26</sup> *CCH*, *supra* note 19 at para 16.

<sup>27</sup> *Appellant 6A Factum* at para 15 [*Appellant's Factum*].

the result of an author's comparative evaluation of possible outcomes for the work, and results from the use of knowledge, aptitude, and practised ability.<sup>28</sup> The Appellant suggests that a photographer's experience itself evidences skill and judgment in the selection of composition on an ongoing basis.<sup>29</sup> This is an equivocation: while experience may suggest a photographer's capacity to manipulate photographic composition in an original way, it is not referred to in *CCH* or *Trader* as independently sufficient to render a work original.

[21] The Appellant attempts to emphasize their argument that Ms. Rer's experience as a professional photographer lends itself to originality by citing *Trader*, where photographers used their experience to highlight the subject's best features.<sup>30</sup> However, *Trader* is distinguished from the present circumstances because in that case the photographers were able to select their compositional elements from a set of options, which entailed ongoing selection, and there was variation between photos. Each photo in *Trader* was created with the potential application of different variables. In contrast, Ms. Rer optioned no such variables. Rather, she neglected to reassess the compositional elements in each of her subsequent photos.

[22] Finally, the Appellant argues that the use of a similar technique between photos is "a decision inherent to the creativity of the work."<sup>31</sup> The Appellant further submits that Ms. Rer's intention to enable comparison between Bestmont marquees indicates skill and judgment.<sup>32</sup> However, the Appellant has not pointed to any rationale as to why the stagnancy of technique is inherent to the work. While repetition in technique may have implications for the originality of the collection as a whole, it has no bearing on the fact that Ms. Rer did not employ the requisite skill

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<sup>28</sup> *CCH*, *supra* note 19 at para 16.

<sup>29</sup> *Appellant's Factum*, *supra* note 27 at para 16.

<sup>30</sup> *Appellant's Factum*, *supra* note 27 at para 15.

<sup>31</sup> *Appellant's Factum*, *supra* note 27 at para 17.

<sup>32</sup> *Appellant's Factum*, *supra* note 27 at para 17.



and judgment in executing the subsequent Original Photos.

**B. The Appellant has not established defensible copyright in the displayed filtered photos**

[23] The Court of Appeal’s finding that the use of social media filters does not render the Filtered Photos original should be upheld for two reasons: (i) applying filters is not a sufficient expression of skill; and (ii) The alteration of one element of a work is trivial, and therefore mechanical.

**(i) Applying filters is not a sufficient expression of skill**

[24] Ms. Rer applied pre-made social media filters to the Original Photos to produce standard photographic effects. While her choice in filters may reflect judgment, the mundanity and convenience of the filters designed not for photographers but for use by any social media user cannot be said to suggest skill. In *CCH*, it is provided that skill involves the use of knowledge, aptitude, or practiced ability, with the further caveat that the employ of these qualities necessarily involves intellectual effort.<sup>33</sup> The bar determining what constitutes “skill” via the use of intellectual effort should not be set so low as to encompass Ms. Rer’s actions, as this fails to acknowledge the requirement for intellectual judgment when exercising skill in producing original works.

[25] The Appellant mischaracterizes *Gould Estate v Stoddard Publishing Co.* to suggest that the selection of one form of modification from a prescribed set is enough to render a photograph original.<sup>34</sup> In *Gould*, a photographer owned copyright in photographs and the associated captions as the author of those works.<sup>35</sup> The Appellant has compared the act in *Gould* of selecting captions, to Ms. Rer’s selection of filters from an available set.<sup>36</sup> However, the captions in *Gould* were

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<sup>33</sup> *CCH*, *supra* note 19 at para 16.

<sup>34</sup> *Appellant’s Factum*, *supra* note 27 at para 18.

<sup>35</sup> *Gould Estate v Stoddart Publishing Co.*, [1996] OJ No 3288 (QL) at para 17 [*Gould*].

<sup>36</sup> *Appellant’s Factum*, *supra* note 27 at para 18.

narrative quotations authored by the photographer, and were protected as distinct original works.<sup>37</sup> *Gould* is distinguishable because the captions were not features of the associated photos as the Appellant suggests. As a distinctly original work, the captions in *Gould* cannot be compared to an aesthetic element like a filter, which directly affects the underlying photograph. In citing *Gould*, the Appellant has tacitly suggested that copyright ought to be found in the filters themselves, and not the Filtered Photos.

[26] Furthermore, the facts of this case differ from *Gould* significantly. The Appellant has pinpointed the act of selection from a set as the basis for copyright. Bestmont selected their filters from an entirely different set of options than Ms. Rer. The Appellant has failed to provide legitimate grounds for the consideration of filters as an act of skill or judgment, and the Respondent maintains that selecting pre-made filters is not a skillful act. The displayed photos therefore possess no defensible copyright by Ms. Rer.

**(ii) The alteration of one element of a work is trivial, and therefore mechanical**

[27] The application of a filter to an already unoriginal work represents the kind of singular alteration specifically precluded from originality in *CCH*.<sup>38</sup> Filters are the mechanical application of a series of effects over which the user has little to no control. As a trivial exercise in skill and judgment, the application of a filter does not confer originality onto the work, and the Filtered Photos are mere reproductions of the Original Photos. Ms. Rer's application of a filter simply constitutes the mechanical alteration of something that already does not possess copyright.

[28] While the Appellant helpfully raises *Goldi Productions Ltd et al v Bunch*, they have mischaracterized this case. In *Goldi*, the Defendant took a picture of an image Mr. Goldi posted on the internet, enhanced it with a computer software, and then used it in a blog post. The Court

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<sup>37</sup> *Gould*, *supra* note 35 at para 23.

<sup>38</sup> *CCH*, *supra* note 19 at para 16.

there held that the process of taking a picture of an image and enhancing the photograph in a computer program is a mechanical exercise.<sup>39</sup> The Appellant attempts to distinguish *Goldi* by claiming that the defendant enhanced the photo without a mind towards their audience. This claim is not factually supported in *Goldi*. Instead, *Goldi* illustrates that the enhancement via computer program of a picture of an original work cannot itself be considered original.

### **C. The existence of copyright in the Façades project is irrelevant**

[29] The Appellant has not cited any facts indicating that Bestmont copied Ms. Rer's arrangement of photos. This is because there are no facts in evidence to this effect. The only relevant evidence on record is that Ms. Rer presented a compiled portfolio and Bestmont hung photos around their hotels. There is therefore no evidence that Bestmont infringed the Façades project as a whole. This is an irrelevant consideration by the Appellant.

## **2) The Court of Appeal was correct in finding that the Respondent did not infringe any copyright**

[30] The Court of Appeal was correct in protecting Bestmont from Ms. Rer's claim of infringement for three reasons: (A) Bestmont did not substantially reproduce Ms. Rer's original expressions; (B) Bestmont is immune from claims of copyright infringement due to their ownership of copyright in the underlying work; and (C) the Respondent has not alleged copyright infringement against Ms. Rer.

### **A. The Respondent did not substantially reproduce the Appellant's original expressions**

[31] A work that is substantially similar to another work may be found to infringe copyright.<sup>40</sup> The Appellant has argued at length that Bestmont's photos were substantial reproductions of Ms. Rer's works. However, Bestmont should not be found to have substantially reproduced Ms. Rer's

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<sup>39</sup> *Goldi Productions Ltd et al v Bunch*, 2018 Sup Ct (Sm Cl Div) Brampton 15-5800 at para 15 [*Goldi*].

<sup>40</sup> *Copyright Act*, *supra* note 1 at para 3(1).

works because the test for substantial similarity is needlessly applied. The Court of Appeal did not overturn the Trial Judge’s findings of substantial similarity, and the Appellant has not alleged that the Court of Appeal erred by making such a decision. Given the lacuna of evidence and the lack of a specific error pointed to by the Appellant, the Respondent has no basis to address the Appellant’s submissions to this point.

**B. The Respondent is immune from claims of copyright infringement due to their ownership of copyright in the underlying work**

[32] Even if Ms. Rer’s works are found to be original, Bestmont is immune from claims of infringement for two reasons: (i) section 3(1) of the *Copyright Act* grants Bestmont the right to use derivative works; and (ii) there is no basis to justify a claim of copyright against the owner of an underlying work.

**(i) Section 3(1) of the *Copyright Act* grants the Respondent the right to use derivative works**

[33] Bestmont possesses copyright in their famous marquees.<sup>41</sup> Consequently, Ms. Rer’s photographs bear that underlying, copyrighted work. Per section 3(1) of the *Act*, Bestmont has the right to produce and reproduce works derived of its copyrighted materials.<sup>42</sup> Bestmont’s display of photos depicting their own marquee constitutes the exercise of this right, as the Appellant’s photos are ‘based on’ and therefore derivative of Bestmont’s copyrighted marquees.

**(ii) There is no basis for a claim of copyright against the owner of an underlying work**

[34] The *Copyright Act* confers the right for authors of original works to defend their copyright against infringement. It does not confer – explicitly or otherwise – the right for authors of derivative works to exert claims against the owner of the underlying work as they exercise their rights under s 3(1). As noted by the Appellant, the doctrine of derivative works does not apply in

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<sup>41</sup> *Bestmont TCCIP*, *supra* note 2 at para 11.

<sup>42</sup> *Copyright Act*, *supra* note 1 at s 3(1) (use the work in “any substantial part thereof in any material form”).

Canada.<sup>43</sup> The reproduced art is therefore not excused under the doctrine of derivative works or any clause under the *Copyright Act*, and Ms. Rer cannot claim infringement against Bestmont.

**C. The Respondent has not alleged copyright infringement against the Appellant**

[35] The appellant has argued that Ms. Rer acted legally in taking, editing, and arranging the Original Photos, Filtered Photos, and Façades project. The Respondent agrees. This is not of issue before the court because Bestmont has not alleged infringement of its copyright. Consequently, the Appellant's argument to this point has no bearing on whether Bestmont infringed Ms. Rer's copyright.

**3) If the Appellant were eligible for damages, it would be at a lower quantum**

[36] In the event that this Court finds Bestmont infringed on Ms. Rer's copyright, the Court of Appeal's decision on damages should be upheld because: (A) the potential infringement is for a non-commercial purpose and may apply to one work; (B) any potential damages award should be minimal based on the factors set out in s 38.1(5) of the *Copyright Act*; and (C) Ms. Rer should not be entitled to any additional punitive or bad faith damages above the statutory limit.

**A. The potential infringement is for a non-commercial purpose and may apply to one work**

[37] To determine the proper range of damages, this court must first consider the non-commercial benefit range of damages prescribed by section 38.1(1)(b) of the *Copyright Act*. This section limits the range of damages from \$100 to \$5000 per infringed work. Using this range, this Court should only consider one work as being infringed: the first Original Photo. This should be done for two reasons: (i) the alleged infringement was for a non-commercial purpose; and (ii) if there is an award, it should only be for the first Original Photo.

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<sup>43</sup> *Appellant's Factum*, *supra* note 27 at para 28.

**(i) The alleged infringement was for a non-commercial purpose**

[38] Commercial purpose is not defined in section 38.1(1)(a) of the *Copyright Act*. However, the Respondent agrees with the Appellant's definition as set out in *Black's Law Dictionary* which reads: "relating to or connected with trade and traffic or commerce in general."<sup>44</sup> There was no commercial benefit to displaying the photos in the guest floors of the Bestmont hotels. Bestmont's customers pre-book their rooms without ever seeing the displayed photos. There is no evidence that the customers viewed the photos and then decided, because of those photos, that they were going to book a room.

[39] The Appellant cited *Collett v Northland Art Company Canada Inc.*<sup>45</sup> and *Young v Thakur*<sup>46</sup> to indicate that commercial purpose does not require direct profit. Instead, the Appellant argues that any activity that supports or promotes the generation of revenue is commercial in nature.<sup>47</sup> The Respondent agrees. In *Collett*, the defendant, Northland Art Company, was making and selling unauthorized prints of the plaintiff's photographs at art trade shows, and displaying the works for sale on their website. The facts of this case are distinguishable from *Collett* because the customers in *Collett* knew that photographs were going to be displayed at the art shows and on the website. The customers were actively looking to purchase the plaintiff's photographs. Furthermore, the Court in *Collett* found the Northland Art Company was "motivated by profit."<sup>48</sup> Bestmont's use of the photos were never on display for sale, nor were the customers expecting to see decorative photos in the hallways of the guest floors. There is no evidence in the record that the photos

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<sup>44</sup> B Garner, Ed., *Black's Law Dictionary*, (Toronto: Thomas Reuters, 2019) sub verbo, "commercial purpose."

<sup>45</sup> *Collett v Northland Art Company Canada Inc.*, 2018 FC 269 [*Collett*].

<sup>46</sup> *Young v Thakur*, 2019 FC 835 [*Young*].

<sup>47</sup> *Appellant's Factum*, supra note 26 at para 37.

<sup>48</sup> *Collett*, supra note 45 at para 73.

resulted in an increase of Bestmont’s profits. Instead, the photos served a non-commercial benefit; they merely served as interior decoration for the paying guests at the hotel.

[40] Similarly, the facts in *Young* are also improperly applied. The defendants in *Young* used the plaintiff’s sound recording with a music video to advertise their services on their websites.<sup>49</sup> Although no evidence of profit was found, the use was deemed infringement for commercial purposes given the use in advertising.<sup>50</sup> Unlike *Young*, the facts here indicate the photos were not used in any marketing materials.<sup>51</sup> Additionally, because customers would have never known the photos existed in the hallways of the guest floors, it cannot be said that the displayed photos were used to attract new customers.

**(ii) If there is an award, it should only be for the first Original Photo**

[41] Bestmont concedes that they displayed the Original Photos in their hallways. However, Ms. Rer exercised skill and judgment on only one occasion through the first Original Photo. Bestmont should only pay between \$100 and \$5000 for that photo, according to the non-commercial statutory damages range set out in s 38.1(1)(b).

[42] Ms. Rer created the Original Photos and Filtered Photos by mechanical exercise. Bestmont agrees with the Appellant that the rulings in *Thomson v Afterlife Network Inc.*<sup>52</sup> and *Nintendo of America Inc. v King*<sup>53</sup> hold that s 38.1 calculates damages for each infringed work, not each copy made. All of the Original Photos that Ms. Rer gave to Bestmont stem from the single setup of the camera. This understanding of the facts was upheld by the Court of Appeal when it ruled that “at

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<sup>49</sup> *Young*, *supra* note 46 at para 45.

<sup>50</sup> *Young*, *supra* note 46 at paras 45, 63.

<sup>51</sup> *Bestmont TCCIP*, *supra* note 2 at para 8.

<sup>52</sup> *Thomson v Afterlife Network Inc.*, 2019 FC 545 at para 64 [*Thomson*].

<sup>53</sup> *Nintendo of America Inc. v King*, 2017 FC 246 at para 138 [*Nintendo*].

best, Ms. Rer only exercised her skill and judgment once in developing a single concept and technique for the Façades photographs.”<sup>54</sup>

[43] Additionally, the Appellant has counted the entire Façades project as a separate work.<sup>55</sup> This is incorrect. The entirety of the Façades project was never displayed by Bestmont in any of the hotels. Counting Façades as a separate work is inconsistent with the ruling in *Nintendo*, where the court emphasizes that statutory damages should be awarded for each infringed work. Even if this court finds that Bestmont infringed more than one photo, the Façades project should not be included in those works as it would result in counting the same work twice. The Appellant has not pointed to one case that indicates an instance where statutory damages were awarded for both an individual work and a collection of works that includes that individual work.

**B. The award for the first Original Photo should be minimal based on the factors set out in s 38.1(5) of the *Copyright Act***

[44] The court should consider the factors set out in s 38.1(5) when determining what number of statutory damages ought to be just:

- (5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including
- (a) the good faith or bad faith of the defendant;
  - (b) the conduct of the parties before and during the proceedings;
  - (c) the need to deter other infringements of the copyright in question; and
  - (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 for private purposes or not, and the impact of the infringements on the plaintiff.<sup>56</sup>

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<sup>54</sup> *Bestmont CAIP*, *supra* note 13 at para 5.

<sup>55</sup> *Appellant's Factum*, *supra* note 27 at para 39.

<sup>56</sup> *Copyright Act*, *supra* note 1 at s 38.1(5).



**(i) The Respondent did not act in bad faith**

[45] The Respondent did not know they were infringing Ms. Rer’s copyright. Bestmont had always believed they had the right to produce or reproduce any works of their registered copyright under section 3(1) of the *Copyright Act*.<sup>57</sup>

[46] The Appellant indicates that Bestmont “deliberately deceived” Ms. Rer into believing that they were not interested in the Façades project.<sup>58</sup> It is significant that the Appellant makes this allegation without citing to any facts to support the assertion. Bestmont had the belief that Ms. Rer was infringing their copyright and created its own Filtered Photos, using different software from Ms. Rer, of their registered copyright. The Appellant cited *Bell Canada v L3D Distributing Inc.* and *Nintendo* to perpetuate a false narrative that Bestmont had knowingly and deliberately participated in infringement and tried to deliberately conceal their infringement.<sup>59</sup> Bestmont was not avoiding any court orders or proceedings like the defendants in *Bell Canada*,<sup>60</sup> nor were they attempting to hide or conceal their actions like in *Nintendo*.<sup>61</sup> Bestmont had displayed the photos because they believed they had the right to do so under the rights of copyright holders in the *Copyright Act*.

**(ii) The Respondent had properly conducted themselves before and during the proceedings**

[47] The Respondent’s potential quantum of damages should be minimal because Bestmont cooperated with Ms. Rer throughout the course of the proceedings. As a gesture of good faith, Bestmont agreed to remove all the photographs displayed on the guest floors before the

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<sup>57</sup> *Bestmont TCCIP*, *supra* note 2 at para 17.

<sup>58</sup> *Appellant’s Factum*, *supra* note 27 at para 42.

<sup>59</sup> *Appellant’s Factum*, *supra* note 27 at para 42.

<sup>60</sup> *Bell Canada v L3D Distributing Inc. (INL3D)*, 2021 FC 832 at para 100 [*Bell*].

<sup>61</sup> *Nintendo*, *supra* note 53 at para 159.

commencement of trial.<sup>62</sup> This was not an admission of guilt, nor was it to avoid an injunction, as the Appellant suggests.<sup>63</sup>

**(iii) Deterrence is not necessary**

[48] Bestmont's behaviour was not in bad faith; deterrence serves no purpose in the awarding of damages. Bestmont had always known they were using their underlying copyright with respect to their right under section 3(1) of the *Copyright Act*. The Court of Appeal agreed that there was underlying copyright in the work. Given that both Bestmont and the Court of Appeal understood there was no copyright infringement, there is no "bad faith" behaviour that this Court should deter.

[49] The Appellant also relied upon the rulings in *Singga*, *Louis Vuitton* and *Wang*. However, these cases are distinguishable from this case because the deterrence in those instances were a result of non-compliance with court proceedings and a lack of respect for law and order.<sup>64</sup> Bestmont has cooperated throughout these proceedings and has an appreciation for copyright law. As a result, there is no basis to rely on these cases for the proposition that Bestmont's actions are deserving of deterrence.

**(iv) A minimal award is proportionate to the nature of the potential infringement**

[50] If infringement is found, a minimal award is proportionate to the infringement because only one of Ms. Rer's works, and not 51, were infringed. Ms. Rer can license and profit off of the photos herself. If she wants to use and display the photos, Bestmont has withdrawn any copyright infringement claim against her. She is free to use her Façades project as she so chooses for any art exhibits or through posts on her social media page.

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<sup>62</sup> *Bestmont TCCIP*, *supra* note 2 at para 10.

<sup>63</sup> *Appellant's Factum*, *supra* note 27 at para 42.

<sup>64</sup> *Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc*, 2011 FC 776 at para 157 [*Singga*]; *Louis Vuitton Malletier SA v Wang*, 2019 FC 1389 at para 196 [*Wang*]; *Louis Vuitton Malletier SA v Yang*, 2007 FC 1179 at para 25 [*Yang*].

[51] As a result, \$500 is the reasonable amount of statutory damages based on the skill and judgment of Ms. Rer used to administer the first Original Photo.

**C. The Appellant is not entitled to any added punitive or exceptional statutory damages**

[52] If Ms. Rer should be awarded damages, which is denied by the Respondent, these damages should be limited to statutory damages. This is for two reasons: (i) the Trial Judge inappropriately awarded punitive damages in his decision; and (ii) statutory damages are constrained to the limits in the *Copyright Act*.

**(i) The Trial Judge inappropriately awarded punitive damages**

[53] The Appellant argues that the Trial Judge was not awarding punitive damages in his decision.<sup>65</sup> This is a fallacy. When he awarded damages, Lodge, J. specifically references the punitive damages subsection of the *Copyright Act*. The Court held that “while Ms. Rer did not explicitly claim punitive damages, I find that subsection 38.1(7) provides me the discretion to award them.”<sup>66</sup>

[54] Even if the Trial Judge wanted to award punitive damages, the Appellant concedes it was never pleaded.<sup>67</sup> The Supreme Court of Canada in *Whiten v Pilot Insurance Co.* was very clear that punitive damages need to be explicitly pleaded.<sup>68</sup> They were not pleaded here.

**(ii) Statutory damages are constrained to the limits in the *Copyright Act***

[55] In *Compo Co. v Blue Crest Music Inc.*, the Supreme Court of Canada indicated Canadian copyright law is entirely statutory and “copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute.”<sup>69</sup> The *Copyright Act* explicitly states

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<sup>65</sup> *Appellant’s Factum*, supra note 27 at para 52.

<sup>66</sup> *Bestmont TCCIP*, supra note 2 at para 25.

<sup>67</sup> *Appellant’s Factum*, supra note 27 at para 52.

<sup>68</sup> *Whiten v Pilot Insurance Co.*, 2002 SCC 18 at para 86.

<sup>69</sup> *Compo Co. v Blue Crest Music Inc.*, [1980] 1 SCR 357 at para 23.

statutory damages are confined to what is mentioned in the *Act*; a maximum of \$20,000 for commercial purpose and \$5000 for non-commercial purpose, with no discretion above and beyond.

[56] The Appellant has not cited a single case to support the judicial discretion of awarding above the statutory limit. This is because there is no such case. If the Appellant is relying on the alleged bad faith of the Respondent to justify the award of punitive damages, this was already accounted for in the calculation of the statutory damages award per s 38.1(5) of the *Copyright Act*.

[57] The Appellant relies upon *Saskatchewan Government Insurance v Wilson* to show that a mischaracterization of a Trial Judge's punitive damages award can be converted to an award for the breach of the duty of good faith.<sup>70</sup> However, the fiduciary duty between an insured and its insurer as in *Wilson* is irrelevant in the context of a copyright claim. The Appellant has not pointed to any facts that suggest Bestmont owed Ms. Rer a fiduciary duty. The court cannot simply convert any award to a breach of duty of good faith award because no such damages heading exists in the *Copyright Act*.

[58] Additionally, the Appellant states that judges have a duty to increase the damages award to any quantum they deem "just" under the circumstances.<sup>71</sup> This is a misinterpretation of the wording "that the court considers just" in s 38.1(1) of the *Copyright Act*. The subsection should not be interpreted to mean that the courts can exercise their discretion to award above the statutory range. Rather, the court in *Telewizja Polsat S.A. v Radiopol Inc.* specifically held that this subsection allows the judges to make a reasonable assessment in awarding damages within the statutory range to yield a just result.<sup>72</sup>

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<sup>70</sup> *Appellant's Factum*, supra note 27 at para 51; *Saskatchewan Government Insurance v Wilson*, 2012 SKCA 106 at para 65 [*Wilson*].

<sup>71</sup> *Appellant's Factum*, supra note 26 at para 53.

<sup>72</sup> *Telewizja Polsat S.A. v Radiopol Inc.*, 2006 FC 584 at paras 37-38 [*Telewizja*].

**PART V: ORDER REQUESTED**

[59] The Respondent seeks an order dismissing the appeal and costs throughout.

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

### **Legislation:**

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

### **Jurisprudence:**

*Bell Canada v L3D Distributing Inc. (INL3D)*, 2021 FC 832.

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

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

*Compo Co. v Blue Crest Music Inc.*, [1980] 1 SCR 357.

*Goldi Productions Ltd et al v Bunch*, 2018 Sup Ct (Sm Cl Div) Brampton 15-5800.

*Gould Estate v Stoddart Publishing Co.*, [1996] OJ No 3288 (QL).

*Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc.*, 2011 FC 776.

*Louis Vuitton Malletier SA v Wang*, 2019 FC 1389.

*Louis Vuitton Malletier SA v Yang*, 2007 FC 1179.

*Nintendo of America Inc. v King*, 2017 FC 246.

*Rallysport Direct LLC v 2424508 Ontario Ltd*, 2019 FC 1524.

*Saskatchewan Government Insurance v Wilson*, 2012 SKCA 106

*Telewizja Polsat S.A. v Radiopol Inc.*, 2006 FC 584.

*Thomson v Afterlife Network Inc.*, 2019 FC 545.

*Trader v CarGurus*, 2017 ONSC 1841.

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

*Young v Thakur*, 2019 FC 835.

### **Secondary Materials:**

B Garner, Ed., *Black's Law Dictionary* 11<sup>th</sup> ed., (Toronto: Thomas Reuters, 2019).