

IN THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

BETWEEN:

Wanda Rer

Appellant

- and -

Bestmont Hotels

Respondent

FACTUM OF THE APPELLANT

PART I – OVERVIEW

[1] This case is about a large hotel chain’s attempt to expropriate an artist’s original collection of photographs without authorization or compensation, in violation of her copyright. This appeal will have significant implications for the scope of copyright protection over non-infringing derivative works under the Copyright Act (the “*Act*”) and the extent to which courts are willing to award damages to deter bad faith conduct and ensure a just reward for artists.

[2] The Appellant, Wanda Rer (“Ms. Rer”), is a Canadian artist who spent a year photographing each of the Respondent, Bestmont Hotels’ (“Bestmont”) destinations to create a project entitled “Façades.” Bestmont reproduced the Façade photographs without authorization, violating Canadian copyright law and depriving Ms. Rer of a just reward for her artistry.

[3] For the following reasons, the Appellant requests that this Court allow the appeal and restore the Trial Judge’s finding that the Respondent infringed the copyright subsisting in the Façade photographs and is therefore liable for damages.

[4] First, Ms. Rer owns copyright in each of the Façade photographs, which Bestmont infringed. Copyright subsists in each of the Façade photographs as an original artistic work: Ms. Rer exercised skill and judgment in selecting and applying the techniques, camera set-ups and filters that resulted in the photographs. The fact that Bestmont may own copyright in the underlying hotel designs and marquees does not negate the originality of the derivative Façade photographs, nor does it confer upon it any right to reproduce the photos. Bestmont reproduced all or substantially all of the Façade photographs and is thus liable for copyright infringement.

[5] Second, Ms. Rer is entitled to the statutory maximum (\$20,000) for each work infringed in accordance with Section 38.1(1)(a) of the *Act* because Bestmont acted in bad faith and there is a need to deter similar conduct. The Court has the discretion to reduce the quantum of damages

below the prescribed range if one of the following three exceptions is established: (1) Bestmont's infringements were not for commercial purposes; (2) Bestmont was unaware of the infringement; or (3) awarding the statutory minimum is grossly out of proportion to Bestmont's infringements. None of these exceptions are met. Moreover, the Trial Judge's award of \$500,000 in punitive damages is just, considering Bestmont's intentional and persistent infringement.

PART II – STATEMENT OF FACTS

[6] **The Parties:** The Appellant is a Canadian artist, photographer, and social media influencer who makes a living travelling the world and capturing her experiences with her camera. The Respondent is a luxury hotel chain located in prime destinations across Canada.

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

[7] **The Original Photos:** Ms. Rer spent a year travelling to each of the Bestmont destinations and photographing each hotel entrance. She captured 10 photos (hereinafter, the "Original Photos"), each taken directly in front of the hotel from a distance of 100 feet with the marquee centered in the frame. Ms. Rer testified that this distance was specifically chosen to prominently feature the marquee while capturing the unique design features of each hotel's façade. An identical technique and camera set-up was used for each photograph to compare and contrast the design and atmosphere of each hotel.

Trial, supra para 6 at paras 3-4.

[8] **The Filtered Photos:** Drawing from her judgment and experience as a photographer and social media influencer, Ms. Rer then selected and applied filters known as 'sepia', 'oil painting', 'pixilation', and 'pencil drawing' to each Original Photo based on the popularity of each filter and the enhanced effect each would have on the depiction of the hotel design and marquee. The 40 resulting images are hereinafter referred to as the "Filtered Photos."

Trial, supra para 6 at para 5.

[9] **Bestmont's Unauthorized Reproduction:** Ms. Rer approached Bestmont with electronic sample copies and an offer to license the Original and/or Filtered Photos (collectively referred to as the "Façade photographs") for use in its marketing materials. Bestmont rejected Ms. Rer's offer but refused to return her package despite her repeated requests. Bestmont subsequently took the electronic versions of each Original Photo and applied 11 filters to each, including filters with identical names to those chosen by Ms. Rer, using different photo editing software. Bestmont printed the 12 versions of each hotel's Façade photograph and used them to decorate its hallways without crediting or compensating Ms. Rer.

Trial, supra para 6 at paras 6-8.

[10] **Ms. Rer's Lawsuit:** Upon discovering its activities, Ms. Rer contacted Bestmont demanding her photographs be removed. She received no response. She then commenced a claim for copyright infringement, seeking the maximum allowable statutory damages. Bestmont finally agreed to remove the Façade photographs prior to the trial.

Trial, supra para 6 at paras 9-10.

[11] **Trial Decision:** The Trial Court found in favour of Ms. Rer and held that copyright subsists in each one of the Façade photographs as Ms. Rer exercised skill and judgment in developing her technique and camera set-up and in selecting and applying filters. At trial, Bestmont admitted to reproducing the Original Photos. The Court also found that Bestmont was inspired by the Filtered Photos in selecting and applying its own filters and thus substantially reproduced the Filtered Photos. The Court awarded Ms. Rer the maximum amount of \$20,000 per work and an additional \$500,000 in punitive damages as a result of the commercial purpose and substantial breadth of Bestmont's infringement as well as the significant power imbalance and display of bad faith which necessitated deterrence.

Trial, supra para 6 at paras 13, 16-17, 19-26.

[12] **Appellate Decision:** The Court of Appeal overturned the Trial Court’s decision, holding that Bestmont did not infringe Ms. Rer’s copyright. The Court held that Bestmont could not be found to infringe Ms. Rer’s copyright by reproducing the Façade photographs, because Bestmont was the owner of the underlying copyright in the hotel designs and marquee. In *obiter dicta*, the Court of Appeal opined that if there were any copyright in the Façade photographs, it vested only in the collection as a whole because Ms. Rer only exercised skill and judgment once, in developing a single concept and technique. Having found that Bestmont’s use of the Façade photographs was not commercial in nature, the Court would have awarded \$15,000 in statutory damages for a single act of infringement in reproducing the Façades collection as a whole. The Court arrived at this sum by reducing the total licensing fee of the Original Photos (\$30,000) in accordance with the proportionality requirement of Section 38.1(3) of the *Act*.

Bestmont v Rer, 2021 CAPI 333 at paras 1-2, 5-6, 7, 9 [*Appeal*].

PART III – POINTS IN ISSUE

[13] This appeal raises three issues:

- 1) Does Ms. Rer own copyright in the Façade photographs?
- 2) Has Bestmont infringed that copyright?
- 3) What is the appropriate quantum of damages for infringement?

PART IV – ARGUMENTS IN BRIEF

Issue 1: Ms. Rer owns copyright in the Façade photographs as original artistic works

[14] Copyright subsists in each of the Façade photographs because they all individually constitute original artistic works. Subsection 5(1) of the *Act* deems copyright to subsist in “every original literary, dramatic, musical and artistic work.” Photographs are expressly included within the definition of artistic work in section 2 of the *Act*. Additionally, as established below, each of the Façade photographs meets the threshold for originality. Pursuant to subsection 13(1), the

author of a work is the first owner of the copyright therein. As Ms. Rer authored the works and has not assigned copyright to anyone else, she owns the copyright therein.

Copyright Act, RSC 1985 c C-42, ss 5(1), 2, 13(1) [*Act*].

A. Each of the Façade photographs meets the originality threshold

[15] The Court should reinstate the Trial Judge’s holding that each of the Façade photographs satisfies the criteria of originality as Ms. Rer exercised skill and judgment in, *inter alia*, developing and implementing specific photographic techniques, compositions and camera set-up and selecting and applying filters.

[16] In *CCH Canadian Ltd v Law Society of Upper Canada*, the Supreme Court of Canada (the “SCC”) held that for a work to be “original” under the *Act*, it must be more than a “mere copy” of another work and must be a product of an author’s exercise of skill and judgment. McLachlin CJ defined skill as “the use of one’s knowledge, developed aptitude or practised ability in producing the work” and judgment as the “use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work.” The exercise of skill and judgment must not be so trivial as to be characterized as a purely mechanical exercise. With respect to photographs, the originality threshold is low and can be exhibited through various factors including the choice of subject matter, the framing of the scene, the angle of the shot, and the lighting.

CCH Canadian Ltd v Law Society of Upper Canada, 2004 SCC 13 at para 16 [*CCH*].
John S McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, (Toronto: Thomson Reuters Canada, 2003) (loose-leaf updated 2016, release 4), at s 10:11(c) [*Fox*].

i. Each of the Original Photos satisfies the originality criteria

[17] Each of the Original Photos meets the threshold for originality. Ms. Rer exercised judgment in selecting the precise distance, technique, and camera set-up for each photo to prominently feature the marquee and each hotel’s unique features. She also demonstrated skill in

applying her decade of experience as a photographer to implement the chosen specifications and bring her artistic vision to life.

Trial, supra para 6 at para 4.

[18] The Court of Appeal erred in finding that Ms. Rer only exercised her skill and judgment once in developing a single concept and technique for the Façade photographs such that copyright only vests in the collection as a whole. This finding resulted from a misapplication of the law and a failure to appreciate the complexities of photography. First, even if considered individually, each photo possesses the originality required to justify copyright. While some elements were replicated for each photo, Ms. Rer inevitably made individual decisions about angles, lighting and other specifications based on the unique features of each scene, requiring a separate exercise of skill and judgment to produce each image.

Appeal, supra para 12 at para 5.

[19] Second, the achievement of consistency across the Façade photographs only increases the originality of the works. Originality does not require creativity in the sense of being novel or unique. There is no requirement for novel techniques to be demonstrated in each artistic work. In fact, modern art has embraced the use of seriality and repetition as artistic devices that add meaning and expression to a work.¹ Similarly, the artistry demonstrated by Ms. Rer in developing and implementing a consistent aesthetic to accentuate the similarities and differences amongst the Façade photographs is precisely the sort of skill and judgment that the *Act* seeks to reward. Moreover, the act of replicating identical techniques and camera set-up in each photo displays further photographic skill and precision.

CCH, supra para 16 at para 16.

¹ The paradigmatic example of artistic expression via repetition and replication is Andy Warhol's silkscreen prints which gave rise to the concept of "Warholian repetition."

Umberto Eco, “Innovation and Repetition: Between Modern and Post-Modern Aesthetics” (1985) 114:4 *Daedalus* 161 at 166 (JS) [*Eco*].

ii. *Each of the Filtered Photos satisfies the originality criteria*

[20] Ms. Rer exercised both skill and judgment by drawing on her experience as a social media influencer to select and apply specific filters based on her knowledge of each filter’s popularity and its enhanced effect on the depiction of the hotel design and marquee.

Trial, supra para 6 at para 5.

[21] The Court of Appeal erred in finding that Bestmont’s decision to apply other readily available filters evinces the lack of originality in Ms. Rer’s selection of filters. If the Court’s rationale was that the use of filters is not a unique technique justifying copyright protection, this is an error of law. As discussed in paragraph 19, creativity in the sense of uniqueness or novelty is not a requirement for originality.

Appeal, supra para 12 at para 5.

CCH, supra para 16 at para 16.

[22] Alternatively, if the Court’s reasoning was that the application of filters was a “purely mechanical exercise,” this is also erroneous. In *CCH*, the Court provided examples of purely mechanical exercises including changing the font, adding basic factual information, and correcting spelling and grammar mistakes in an existing work. The “sweat of the brow” standard, under which labour or industriousness alone could ground a finding of originality, was rejected in *CCH*. Thus, the Court’s issue with the aforementioned mechanical exercises could not have been the lack of time or effort required. Instead, it can be inferred that such changes did not constitute sufficient “authorial” skill and judgment to distinguish the work from a “mere copy” of the original. This reading is confirmed by the Court’s finding that the production of headnotes and summaries was more than mechanical as it involved drawing on existing legal knowledge and exercising discernment. While creating headnotes or summaries may not have required more

time or effort than editing spelling and grammar, it required the author to express their own ideas and add their own perspective to the work. Ms. Rer carefully selected filters to enhance the depictions of the hotels and achieve certain marketing impressions. This required her to develop her own aesthetic and express that via her filter selection, making it an artistic choice rather than a purely mechanical exercise.

CCH, supra para 16 at paras 24-25, 30, 35.

iii. *The Original and Filtered Photos are not mere copies of Bestmont’s works*

[23] The original arrangement and filters utilized in the Façade photographs makes them more than “mere copies” of the Bestmont’s hotel entrances and marquee designs such that separate copyright can, and does, subsist in them. It is well established that copyright can subsist separately in a compilation of elements that may themselves be copyrighted if there is a sufficient exercise of skill and judgment in the arrangement of the components. Moreover, the Quebec Superior Court held in *Ateliers Tango Argentin Inc c Festival d’Espagne & D’Amérique Latine* that the presence of an existing artistic work in the background of a photograph in no way detracts from the originality of the photo. Instead, the Court found that the original use of the existing material was precisely the particular interest of the photo. Applying these principles to the Façade photographs, the skill and judgement exercised in the arrangement of the photograph and application of filters vests originality and copyright protection in the original aspects of the photographs although they include pre-existing copyrighted material.

Allen v Toronto Star Newspapers Ltd (1997), 152 DLR (4th) at para 13, 36 OR (3d) [*Allen*].
Ateliers Tango Argentin Inc c Festival d’Espagne & D’Amérique Latine [1997] RJQ 3030 at paras 44-45, JQ No 3693 [*Ateliers*].

B. The Façade photographs do not infringe on Bestmont’s copyright

[24] Bestmont has made no claim of copyright infringement against Ms. Rer. Had Bestmont made such a claim, paragraph 32.2(1)(b) would have exempted the Façade photographs from

infringing Bestmont's copyright in the marquee and hotel design. Paragraph 32.2(1)(b) provides an exception to copyright infringement for photographic reproductions of (i) architectural works and (ii) artistic works permanently situated in a public place or building. The Façade photographs fall under this exception as Bestmont's marquee and hotel design can be classified alternatively as architectural works or as artistic works permanently situated in a public place.

Act, supra para 14 at s 32.2(1)(b).

Issue 2: Bestmont infringed the copyright in the Façade photographs

A. Ms. Rer's copyright confers upon her the right to prevent others from reproducing the Façade photographs

[25] The Court of Appeal erred in holding that Ms. Rer had no right to assert copyright against others, and especially against the underlying copyright owner. The Court reasoned that paragraph 32.2(1)(b) is an exception to infringement only and does not confer any right to assert copyright against others. The Appellants do not dispute this point. Rather, as previously described, it is the *originality* of the Façade photographs which vests copyright protection therein under subsection 5(1). Having established the subsistence of copyright, subsection 3(1) of the *Act* gives the copyright holder the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever. Relatedly, subsection 27(1) of the *Act* deems it an infringement of copyright for any person to do, without the consent of the copyright owner, anything that only the owner has the right to do pursuant to the *Act*. In conjunction, these sections of the *Act* give copyright holders the right to prevent others from reproducing all or a substantial part of their copyrighted works.

Act, supra para 14 at ss 32.2(1)(b), 5(1), 3(1), 27(1).

B. Bestmont infringed the copyright in the Façade photographs by reproducing the entirety of the Original Photos and a substantial part of the Filtered Photos.

[26] Bestmont infringed on Ms. Rer’s copyright by reproducing each of the works or a substantial part thereof. Bestmont admitted to reproducing the Original Photos by making identical copies of them. It also reproduced a substantial part of the Filtered Photos by adding filters inspired by the Filtered Photos to the Original Photos and printing the resulting images.

[27] Bestmont’s application of filters of the same name (as those applied by Ms. Rer) to the same Original Photos infringes the copyright in the Filtered Photos. In *Cinar Corporation v Robinson*, the SCC held that “a substantial part of a work is a part of the work that represents a substantial portion of the author’s skill and judgment expressed therein.” Each filter name (‘sepia’, ‘oil painting’, etc.) denotes a particular class of filters yielding a specific, distinctive effect. With the benefit of firsthand evidence, the Trial Judge found that in selecting and applying its own filters, Bestmont was “clearly inspired by the Filtered Photos.” As discussed in paragraph 20, the originality in the Filtered Photos is derived from Ms. Rer’s skill and judgment in selecting filters to achieve a particular enhanced effect on the Original Photos. Despite the availability of other filters, Bestmont chose to use the same type of filters on the same Original Photos, substantially replicating the enhanced effect Ms. Rer achieved using her skill and judgment. Thus, Bestmont’s filtered copies substantially reproduced the Filtered Photos.

Cinar Corporation v Robinson, 2013 SCC 73 at para 26 [*Cinar*].
Trial, *supra* para 6 at para 19.

C. Bestmont's copyright in the hotel design and marquee does not confer upon it a right to reproduce the original elements in the Façade photographs

[28] The Court of Appeal erred in interpreting subsection 3(1) of the *Act* as conferring upon copyright holders a positive right to reproduce their work in “any material form” including reproducing original elements of another author’s copyrighted derivative work. It is well-established that copyright grants only negative rights to prevent another from appropriating the labours of an author via the right to sue for copyright infringement. This is despite the plain

meaning of subsection 3(1) which gives a copyright holder the sole right to reproduce a work in any material form whatever. Interpreting the *Act* to confer upon Bestmont, the “underlying copyright holder,” a positive right to reproduce its copyright in its hotel and marquee designs in the form of the Façade photographs would undermine the principal goals of the *Act*.

Appeal, supra para 12 at para 2.
Canadian Admiral Corp v Rediffusion Inc, [1954] Ex CR 382 at para 17, 20 CPR 75 [*Rediffusion*].
Act, supra para 14 at s 3(1).

i. Immunizing underlying copyright holders from infringement of derivative works would undermine the goals of the Copyright Act

[29] Interpreting the *Act* to confer upon underlying copyright holders a positive right to reproduce derivative works would undermine both key goals of the *Act* of (1) promoting the public interest in the encouragement and dissemination of works of the arts and intellect and (2) obtaining a just reward for the creator. Such an interpretation would allow underlying copyright owners to appropriate the creative efforts of authors of derivative works without compensation, depriving such authors of a just reward for sharing their original expression and discouraging them from creating more works. As noted in the U.K. case of *Redwood Music v Chappell*, such an absurd interpretation would even allow an owner of an underlying copyright to license the right to create an adaptation to another author for a fee; however, once the adaptation is produced, the underlying owner could exploit the work themselves and appropriate the adaptor’s profits. Such a scenario cannot be in accordance with the goals of the *Act* as it would permit unjust enrichment and completely undermine the licensing system.

William J Braithwaite, “Derivative Works in Canadian Copyright Law” (1982), 20:2 OHLJ 192 at 211-213 [*Braithwaite*].
Redwood Music v Chappell [1982] RPC at 117 [*Chappell*].

[30] The modern approach taken by Canadian courts beginning in *Théberge v Galerie d’Art du Petit Champlain Inc* has been to interpret exceptions to copyright infringement broadly to avoid unduly limiting the “ability of the public domain to incorporate and embellish creative

innovation in the long-term interests of society as a whole.” In *CCH*, the SCC further held that the enumerated exceptions were “user’s rights” with remedial purposes. Therefore, it would be contrary to legislative intent to subject derivative works made in accordance with these “user’s rights” to an additional restriction not applicable to other copyrighted works by preventing them from enforcing their copyright against the owner of an underlying copyright. Interpreting the *Act* in this way would discourage authors from exercising their user’s rights to embellish creative innovation since they are always at risk of the underlying owner appropriating their works.

Théberge v Galerie d’Art du Petit Champlain Inc, 2002 SCC 34 at para 32 [*Théberge*].
CCH, *supra* para 16 at para 48.

ii. *The Act should be interpreted to grant each copyright holder rights over their respective original expression to uphold the goals of the Copyright Act*

[31] The *Act* should instead be interpreted such that each copyright owner has the sole right to reproduce their work in any material form to the extent of their own original expression. This approach would fairly recognize and reward both authors’ creative efforts without overcompensating or undercompensating either party. Applied to this case, Bestmont would be able to reproduce its own hotel designs and marquees including by photographing them itself using its own composition and techniques. However, Bestmont would not be able to reproduce Ms. Rer’s photographs exactly such that it is copying the angles, composition, lighting, filters, etc. which derive from Ms. Rer’s skill and judgment.

Issue 3: The Trial Judge correctly awarded \$1,500,000 in total damages

A. The Trial Judge correctly awarded \$20,000 in statutory damages for each of the 50 infringed works

[32] Under the *Act*, a copyright owner may elect to recover either actual damages and profits or be awarded statutory damages. The legislature recognized that actual damages are often

difficult to prove in copyright cases. Therefore, statutory damages can be awarded based on a case-by-case assessment of all relevant circumstances in order to yield a just result.

Act, supra para 14 at s 38.1(1).

Rallysport Direct LLC v 2424508 Ontario Ltd, 2020 FC 491 at para 6 [*Rallysport*].

[33] Statutory damages need not be correlative to the actual damages Ms. Rer sustained. The use of probable damages as an estimate in determining statutory damages is one means of ensuring that any damages award is fair and proportionate, but it is not determinative. This Court must consider all relevant factors, including the bad faith of the defendant, the parties' conduct before and during the proceedings, and the need to deter future copyright infringement. Since Bestmont's conduct demonstrated bad faith and there is a need to deter such conduct, this Court should restore the maximum statutory damages awarded by the Trial Judge.

Rallysport, supra para 32 at para 8.

Act, supra para 14 at ss 38(1)(5)(a-c).

i. Bestmont acted in bad faith prior to the proceedings justifying a high statutory award

[34] This Court should reinstate the Trial Judge's finding that Bestmont acted in bad faith prior to the proceedings. An important consideration in relation to bad faith conduct is the continuation of infringing activity after receiving notice. Bestmont acted in bad faith by deliberately continuing to ignore Ms. Rer's demands to return the package and remove the infringing hallway displays. In *Rallysport*, the Court held that the defendants acted in bad faith because they had ample time to cease infringing after receiving a cease-and-desist letter but continued the infringing activity without conducting the necessary due diligence. In *LS Entertainment Group Inc v Formosa Video (Canada) Ltd*, the Federal Court found that the defendant acted in bad faith by continuing to display and rent out copies of the films at issue despite the plaintiffs' copyright claims having been brought to the attention of the defendants. Similarly, Bestmont continued its infringing activity despite being made aware of a potential

breach of copyright and therefore acted in bad faith. Further, Bestmont acted in bad faith by abusing the power imbalance between it, as a large and sophisticated corporation, and Ms. Rer, as an individual content producer. Bestmont leveled baseless allegations of infringement against Ms. Rer to try to scare her off. Bad faith can be inferred when a large company like Bestmont tramples over the rights of a party with significantly less economic power.

Microsoft Corp v 1276916 Ontario Ltd, 2009 FC 849 at para 40 [*Microsoft*].
Rallysport, *supra* para 32 at paras 35-37.
LS Entertainment Group Inc v Formosa Video (Canada) Ltd, 2005 FC 1347 at para 65 [*Formosa*].

[35] The Court of Appeal erred in holding that Bestmont did not act in bad faith because it genuinely believed that it had a right to reproduce the photographs of its own hotels. Even if Bestmont held such a belief, it should have been alerted to a potential breach of copyright after Ms. Rer's demand to remove the hallway displays. Conducting the necessary due diligence would have revealed Ms. Rer as the owner of copyright in the Façade photographs.

Appeal, *supra* para 12 at para 8.

[36] While courts have been reluctant to find bad faith when defendants entered a new market without appreciation for industry standards or where there was a miscommunication regarding ownership of copyright, there is no such evidence here that would redeem Bestmont. In *Young v Thakur*, evidence of miscommunication regarding ownership of copyright and the defendant's attempt to resolve the copyright dispute mitigated against a finding of bad faith, even though the defendant failed to concede to the demands of the cease-and-desist letter upon receipt. In contrast, Bestmont's complete inaction and refusal to conduct due diligence or cooperate with Ms. Rer's demands shows bad faith.

Century 21 Canada Ltd Partnership v Rogers Communications Inc, 2011 BCSC 1196 at para 410 [*Century 21*] the Court did not find bad faith even though cease-and-desist letters were sent, because the defendant entered into a new market without due appreciation for standardized protocols and community standards of the industry.
Young v Thakur, 2019 FC 835 at paras 19-20, 63 [*Young*].

ii. A high statutory award is necessary to deter Bestmont's infringing conduct and similar future conduct

[37] Statutory damages must be high enough to serve a salutary message and deter future infringement of the copyright in question. A high statutory award is necessary to deter further infringing activity by Bestmont as well as to generally deter similar conduct.

Microsoft Corp v PC Village Co, 2009 FC 401 at para 39 [*PC Village*].

[38] This Court should recognize the need to deter further infringing activity by Bestmont, especially given the ease of copying using modern technology. Where there is evidence demonstrating the ease with which copyright can be infringed, there is a heightened need to deter further infringements. In this case, the ease of Bestmont's infringement process and the scale of infringement were facilitated by modern technology. Bestmont simply stored high-resolution electronic copies of the Original Photos, applied filters through photo editing software to create variations for its own needs, and batch-printed 120 copies.

Collett v Northland Art Company Canada Inc, 2018 FC 269 at para 63 [*Collett*].

[39] In addition to deterring further infringing activity by Bestmont, there is a need to generally deter infringing conduct like Bestmont's because it exploits artists. A high statutory award is required to deter similar infringing conduct in situations involving significant power imbalance between parties, and blatant disregard for copyright laws by the dominant party in exploiting the more vulnerable party. The Court in *Rallysport* held that continued infringement despite repeated warnings warranted deterrence. The Court in *Trader Corp v CarGurus, Inc* also included a deterrence factor for the defendant's failure to conduct due diligence to ascertain the copyright owner of disputed works. The Trial Judge accurately stated that "the power imbalance between the parties requires this Court to send a message that large corporations must respect rights of individual content producers." Bestmont is a large corporation that took advantage of a young artist. Many artists in Ms. Rer's situation would not have had the means to bring a claim

to enforce their rights. Therefore, there is a strong need to deter conduct like Bestmont's in order to prevent the exploitation of artists.

Microsoft, supra para 34 at paras 42-43.

Trial, supra para 6 at para 24.

Rallysport, supra para 32 at para 42.

Trader Corp v CarGurus, Inc, 2017 ONSC 1841 at para 67 [*Trader*].

[40] This Court should also recognize that similar conduct, if allowed to continue, may have serious consequences that would erode the value of artistry. The Federal Court in *Louis Vuitton* held that one aspect of deterrence is to prevent “the erosion of the market for which the plaintiffs have worked very hard.” Conduct like Bestmont's undervalues and erodes the artistry and livelihood of artists who have devoted effort to perfecting their craft. If everyone acted like Bestmont, compensation would no longer be available to photographers to create content.

Louis Vuitton Malletier SA v Yang, 2007 FC 1179 at para 25 [*Louis Vuitton*].

B. Bestmont's infringement does not justify awarding Ms. Rer statutory damages below the prescribed range under Section 38.1(1)(a) of the Copyright Act

[41] Section 38.1(1) of the *Act* entitles a copyright owner to an award of statutory damages for each work infringed in a sum not less than \$500 and not more than \$20,000, unless one of the following three exceptions is established: (1) Bestmont's infringements were not for commercial purposes; (2) Bestmont was unaware of the infringement; or (3) awarding the statutory minimum is grossly out of proportion to Bestmont's infringements. None of these exceptions are met and Ms. Rer is entitled to statutory damages within the prescribed range for each of her 50 works.

Act, supra para 14 at ss 38.1(1)(b), (2), (3).

i. Bestmont's use of the infringing photographs was of a commercial nature

[42] “Commercial” usage under the *Act* is interpreted broadly and encompasses actions that are indirectly revenue-generating or possess a general business-interest quality. There need not be discernable or demonstrable profitability for an activity to be considered “commercial” under

the *Act*. In *Trout Point Lodge Ltd v Handshoe*, the Nova Scotia Supreme Court held the defendant's use of copyrighted photos in their blog to be a commercial operation because they were used to slander Trout Point Lodge and affect its business interests.

Trout Point Lodge Ltd v Handshoe, 2014 NSSC 62 at para 18 [*Trout Point Lodge*].

[43] The Court of Appeal was incorrect in holding that Bestmont's use of the infringing photographs was not of a commercial nature because there was no evidence of financial benefit or business advantage to Bestmont. Part of Bestmont's brand and business strategy is its careful design and curation of its hotels to provide an authentic experience inspired by the destination. The purpose of Bestmont's use of the infringing photographs to decorate its guest hallways was to enhance the aesthetics of its interior, which would in turn improve guest experience and attract customers. This is undoubtedly a marketing strategy that implies an intention to increase profits and is therefore "commercial" within the meaning of the *Act*. This Court should therefore reinstate the Trial Judge's finding that Bestmont's use of the infringing photographs was a commercial activity.

Trial, supra para 6 at para 2.

Appeal, supra para 12 at para 7.

ii. *Prior to the proceedings, Bestmont did not have reasonable grounds to believe that it had not infringed on Ms. Rer's copyright*

[44] While a court may reduce the amount of an award to less than \$500 (but not less than \$200) if it is satisfied that the defendant was unaware of infringement, this provision does not apply here. Bestmont's continued infringement despite being put on notice by Ms. Rer can suggest no such lack of awareness.

Act, supra para 14 at s 38.1(2).

[45] Even if Bestmont thought it was entitled to reproduce Ms. Rer's works as the underlying copyright owner of the hotel designs and marquee, it should have been aware, by virtue of Ms.

Rer's repeated notices, that its use of Façade photographs potentially breached copyright. To ignore a claim is to run the risk of potential liability of breach of ownership of copyright if infringement is eventually proven.

Trial, *supra* para 6 at para 17.
Rallysport, *supra* para 32 at para 37.
Century 21, *supra* para 36 at para 416.

iii. Awarding Ms. Rer at least the statutory minimum per infringed work would not be grossly disproportionate to Bestmont's infringement

[46] The prescribed range for commercial infringements can be reduced "where there is more than one work in a single medium and where awarding the minimum per work would yield a total award that is grossly out of proportion to the infringement." While Ms. Rer's works are rendered in a single medium, awarding the statutory minimum would not be disproportionate to Bestmont's infringement.

Act, *supra* para 14 at ss 38.1(3)(a-b).

[47] The associated production costs, including travel fees to each Bestmont location, accommodation, labour, and license fees (\$3,000 per image), should all be captured within the statutory award. While quantifiable damages are not determinative, such estimates are one means of ensuring that any damages award is fair and proportionate. The *Act* protects an owner's right to profit economically from their work by controlling the right to reproduction and other attendant rights once the work has been created in fixed form. Therefore, it is within the ambit of protectable interests of the *Act* for a copyright owner to capture some or even all of their creation costs in the sale price, and any licensing fees for their works. This principle was recognized implicitly in *Trader*, where the Court based its statutory award assessment in part on a rough per-work estimate of the labour costs involved in producing those photos. Therefore, while Ms. Rer's works are rendered in a "single medium," factoring in the associated production costs of

travelling for a year and license fees, awarding her at least the statutory minimum per work would not be grossly out of proportion to Bestmont's infringement.

Ronald Dimock, *Intellectual Property Disputes: Resolutions & Remedies* (Toronto: Thomson Reuters Canada, 2016) (loose-leaf revision 5), ch 3 at p 3-38 [*Dimock*].

Rallysport, *supra* para 32 at paras 25-26.

Trader, *supra* para 39 at para 67.

Appeal, *supra* para 12 at para 8.

[48] This Court should also consider the lost opportunity costs Ms. Rer incurred. But for Bestmont's infringement, Ms. Rer would have had the freedom to utilize the Façade photographs for other undertakings to generate further profits. However, Bestmont's infringement depreciated the value of the Façades' copyright as an asset. In *Don Hammond*, the Court found an award in accordance with the statutory minimum grossly disproportionate to the infringement because the plaintiff photographer was hired under a pre-negotiated contract and the defendant merely failed to pay the invoice. Therefore, the only financial loss suffered by the plaintiff was the unpaid account as there was no evidence that he was planning to use these photos otherwise. Ms. Rer's situation is distinct as she was not in a contractual relationship with Bestmont.

Rallysport, *supra* para 32 at para 28.

Don Hammond Photography Ltd v Consignment Studio Inc, 2008 ABPC 9 at para 15 [*Don Hammond*].

C. Bestmont's conduct warrants an award of \$500,000 in punitive damages

[49] The Court of Appeal erred in holding that the Trial Judge had no discretion to award statutory damages in excess of the statutory range because Ms. Rer did not plead punitive damages as a separate basis for relief. However, punitive damages need not be specifically or separately set out in the pleadings.

Appeal, *supra* para 12 at para 8.

Paragon Properties Limited v Magna Envestments Ltd, [1972] 3 WWR 106, 1972 CarswellAlta 23 (WL Can) at paras 27, 31-32 [*Paragon*].

[50] Bestmont's conduct warrants an award of punitive damages because it represents a "marked departure from ordinary standards of decent behaviour." Punitive damages are awarded

when all other damages have been accounted for and the court concludes that those damages are "inadequate to accomplish the objectives of retribution, deterrence and denunciation." This Court must consider (a) whether the conduct was planned and deliberate; (b) the intent and motive of the defendant; (c) whether the defendant persisted in the outrageous conduct over a lengthy period of time; (d) whether the defendant concealed or attempted to cover up its misconduct; (e) the defendant's awareness that what it was doing was wrong; and (f) whether the defendant profited from its misconduct.

Whiten v Pilot Insurance Co, 2002 SCC 18 at paras 36, 123 [*Whiten*].
Collett, supra para 38 at para 72.

[51] This Court should restore the Trial Judge's punitive award of \$500,000 because Bestmont's actions satisfy factors (a), (b), (c), and (e). Bestmont repeatedly ignored Ms. Rer's requests of removal and threatened her with baseless allegations of infringement. Bestmont only removed the displays just before trial, showing that not only was Bestmont negligent in conducting due diligence to ascertain ownership of copyright in the Façade photographs, it also must have been aware of the infringement. It only refused to correct its actions because it thought a young artist like Ms. Rer was easily exploitable and would be too frightened to go up against a large corporation.

PART V – ORDER REQUESTED

[52] The Appellant respectfully requests for the Court of Appeal's decision to be reversed and the Trial Court's decision to be reinstated.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 14th day of January, 2022

Team No. 9

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), 38.1(1), 38.1(2), 38.1(3), 38.1(5)(a)(b)(c)
INTERNATIONAL MATERIALS	
<i>Redwood Music v Chappell</i> [1982] RPC.	page 117
JURISPRUDENCE	
<i>Allen v Toronto Star Newspapers Ltd</i> (1997), 152 DLR (4 th), 36 OR (3d).	para 13
<i>Ateliers Tango Argentin Inc c Festival d’Espagne & D’Amérique Latine</i> [1997] RJQ 3030, JQ No 3693.	paras 44-45
<i>Canadian Admiral Corp v Rediffusion Inc</i> , [1954] Ex CR 382, 20 CPR 75.	para 17
<i>CCH Canadian Ltd v Law Society of Upper Canada</i> , 2004 SCC 13	para 16, 24-25, 30, 35, 48
<i>Century 21 Canada Ltd Partnership v Rogers Communications Inc</i> , 2011 BCSC 1196.	paras 38, 47
<i>Cinar Corporation v Robinson</i> , 2013 SCC 73.	para 26
<i>Collett v Northland Art Company Canada Inc</i> , 2018 FC 269.	paras 40, 52
<i>Don Hammond Photography Ltd v Consignment Studio Inc</i> , 2008 ABPC 9.	para 50
<i>Louis Vuitton Malletier SA v Yang</i> , 2007 FC 1179.	para 42
<i>LS Entertainment Group Inc v Formosa Video (Canada) Ltd</i> , 2005 FC 1347.	para 36
<i>Microsoft Corp v PC Village Co.</i> 2009 FC 401.	para 39

<i>Microsoft Corp v 1276916 Ontario Ltd</i> , 2009 FC 849.	paras 36, 41
<i>Paragon Properties Limited v Magna Investments Ltd</i> , [1972] 3 WWR 106, 1972 CarswellAlta 23 (WL Can).	para 51
<i>Rallysport Direct LLC v 2424508 Ontario Ltd</i> , 2020 FC 491.	paras 34-36, 41, 47, 49-50
<i>Théberge v Galerie d'Art du Petit Champlain Inc</i> , 2002 SCC 34.	paras 22, 32, 57
<i>Trader Corp v CarGurus, Inc</i> , 2017 ONSC 1841.	paras 41, 49
<i>Trout Point Lodge Ltd v Handshoe</i> , 2014 NSSC 62.	para 44
<i>Whiten v Pilot Insurance Co</i> , 2002 SCC 18.	para 52
<i>Young v Thakur</i> , 2019 FC 835.	para 48

SECONDARY MATERIALS	
John S McKeown, <i>Fox Canadian Law of Copyright and Industrial Designs</i> , (Toronto: Thomson Reuters Canada, 2003) (loose-leaf updated 2016, release 4).	s 10:11(c)
Ronald Dimock, <i>Intellectual Property Disputes: Resolutions & Remedies</i> (Toronto: Thomson Reuters Canada, 2016) (loose-leaf revision 5).	pages 3-38
Umberto Eco, "Innovation and Repetition: Between Modern and Post-Modern Aesthetics" (1985) 114:4 <i>Daedalus</i> 161 (JS).	page 166
William J Braithwaite, "Derivative Works in Canadian Copyright Law" (1982), 20:2 OHLJ.	pages 211-213

OTHER SOURCES	
<i>Bestmont v Rer</i> , 2021 CAPI 333.	paras 1-10, 13, 16-17, 19-26, 38, 45, 49, 51
<i>Rer v Bestmont Hotels</i> , 21 TCCIP 1222.	paras 1-2, 5-6, 7, 9, 41, 45, 47