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] This case is about the Appellant's attempt to inappropriately expand the scope of protection afforded by the *Copyright Act*. In so doing, the Appellant threatens to unduly constrain the Respondent's legitimate right to reproduce its own copyrighted works.

[2] The Respondent, Bestmont Hotels ("Bestmont"), is a luxury hotel chain that is nationally renowned for its copyrighted hotel designs and marquee. The Appellant, Wanda Rer ("Ms. Rer"), is a self-described social media influencer. Ms. Rer took ten photographs of Bestmont's hotels and its distinctive marquee without permission (the ten "Original Photos") and applied filters readily found on a social media platform to create additional photographs (the forty "Filtered Photos"). Ms. Rer then brazenly offered to licence the photographs (collectively the fifty "Façade photographs") to Bestmont for use in its marketing materials. Faced with Ms. Rer's disrespect for its copyright in the hotel designs and marquee, Bestmont rejected the offer and accused Ms. Rer of copyright infringement. Believing that its underlying copyright entitled it to use Ms. Rer's works as it saw fit, Bestmont itself applied filters to the Original Photos to create over a hundred new images. These images were not used for any commercial purpose. They were printed and used as interior decorations in Bestmont's hotels (the "hallway photographs").

[3] Ms. Rer alleges that Bestmont's activities have infringed her copyright in the Façade photographs. Her allegations of copyright infringement fail for two reasons.

[4] First, copyright does not subsist in the Façade photographs. At best, only one of the Original Photos is an original work within the meaning of the *Copyright Act* (the *"Act"*). However, even if all ten Original Photos were original works, the merger doctrine would apply to prevent copyright from subsisting in any of the Original Photos. In addition, none of the Filtered Photos is an original work within the meaning of the *Act*.

[5] Second, Bestmont's activities are non-infringing. As the owner of copyright in the hotel designs and marquee, Bestmont has an exclusive right to reproduce its copyrighted works in photographic form. Further, even if copyright subsists in Ms. Rer's Filtered Photos, Bestmont's hallway photographs are independent creations.

[6] Even if Ms. Rer succeeds in her claim for copyright infringement, she can claim no more than $15,000 in total damages. Because Bestmont neither acted in bad faith nor infringed for a commercial purpose, and because Ms. Rer suffered no financial loss, any amount above $15,000 would be grossly disproportionate to any alleged infringement. Further, because there is little to no risk that the Façade photographs will be infringed after trial, deterrence is not a relevant consideration. For the same reasons, an award of punitive damages would be entirely inappropriate.

[7] The Court of Appeal correctly held that Bestmont did not infringe any copyright in the Façade photographs. The Respondent requests that the Court of Appeal's decision be upheld.

PART II: STATEMENT OF FACTS

[8] **The Parties:** The Respondent, Bestmont, is a luxury hotel chain known for its ten high-end hotels located in prime destinations throughout Canada. These hotels are nationally renowned for the uniqueness of their designs and for the famous red marquee that adorns each hotel entrance. Bestmont has registered copyright in both the hotel designs and marquee. The Appellant, Ms. Rer, is an amateur photographer and self-proclaimed social media influencer.

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

[9] **The Façades Project:** Without consulting Bestmont, Ms. Rer took a single photograph of each of Bestmont's hotels (the ten "Original Photos"). Each photograph was taken directly in front of the hotel's entrance at a distance of 100 feet. While the centerpiece of each photograph

was Bestmont's marquee, the photographs also depicted the unique design features of the hotels' façades. Ms. Rer testified to using the exact same technique and camera set-up for each of the Original Photos. Using a popular social media platform, Ms. Rer subsequently applied four commonly used and widely available filters to each of the Original Photos (the forty "Filtered Photos").

Trial, *supra* para 8 at paras 3-5.

[10] **The Proposal:** Ms. Rer offered to license the Original Photos and/or Filtered Photos (collectively the fifty "Façade photographs") to Bestmont for use in its marketing materials for $3,000 per photograph, and a total price of $150,000. She provided Bestmont with a portable drive containing electronic copies of the Façade photographs. Bestmont rejected Ms. Rer's offer and accused her of infringing its registered copyright in the hotel designs and marquee. Bestmont also demanded that Ms. Rer destroy all copies of the photographs. Although Ms. Rer requested that the portable drive be returned, she did not assert any copyright interest in the Façade photographs.

Trial, *supra* para 8 at paras 6-7.

[11] **Bestmont's Activities**: Bestmont decided to use only the Original Photos to decorate the interior of its hotels, believing that it was justifiably entitled to do so as the copyright owner of the subject matter of the photographs—the hotel designs and marquee. Using photo editing software, Bestmont applied eleven commonly available filters to each of the Original Photos to create a total of twelve images for each hotel. Four of these filters happened to have the same names as the filters used by Ms. Rer to create the Filtered Photos. Bestmont printed and framed the twelve images and used them to decorate the hallways of its guest floors (the "hallway photographs"). Bestmont did not assign any credit to Ms. Rer for its hallway photographs.

Trial, *supra* para 8 at para 8.

[12] **Ms. Rer's Lawsuit**: When Ms. Rer learned of Bestmont's activities, she demanded that the hallway photographs be removed. She again did not assert any copyright interest in the Façade photographs. Bestmont did not respond to the demands, believing that it had already made its legal position clear when it accused Ms. Rer of infringing copyright in its hotel designs and marquee. Ms. Rer subsequently commenced a claim alleging that Bestmont had infringed her copyright in the Façade photographs. Before trial, Bestmont voluntarily removed the hallway photographs from its hotels.

Trial, *supra* para 8 at paras 9-10.

[13] **Trial Decision**: The Trial Court erroneously held in Ms. Rer's favour. It held that copyright subsisted in the Façade photographs because Ms. Rer had exercised skill and judgment in creating both the Original and Filtered Photos. It also held that Bestmont's hallway photographs had infringed copyright in the Façade photographs, notwithstanding Bestmont's registered copyright in the hotel designs and marquee. Ms. Rer was awarded $1,000,000 in statutory damages and $500,000 in punitive damages. In justifying an award of this size, the Court pointed to its findings that Bestmont had acted in bad faith and had used its hallway photographs for a commercial purpose. In addition, the Court appealed to the general need to deter large corporations from exploiting vulnerable artists.

Trial, *supra* para 8 at paras 13, 16-21, 23-25.

[14] **Court of Appeal Decision**: The Court of Appeal unanimously overturned the Trial Court's decision, holding, for two reasons, that Bestmont had not infringed any copyright in the Façade photographs. First, Bestmont was entitled to reproduce its own copyright in the hotel designs and marquee in any material form—including photographic form. Second, Ms. Rer was not entitled to assert any copyright interest in the photographs against Bestmont, the underlying copyright owner. Even if there had been infringement, the Court found that Ms. Rer could claim

no more than $15,000 in total damages. Because Bestmont neither acted in bad faith nor used its hallway photographs for a commercial purpose, and because Ms. Rer suffered no financial loss, an award of statutory damages in any amount above $15,000 would have been grossly disproportionate to any infringements.

Bestmont v Wanda Rer, 2021 CAIP 333 at paras 1-3, 5, 7-10 [*Appeal*].

PART III: POINTS IN ISSUE

[15] This appeal raises three issues:

1. Does copyright subsist in Ms. Rer's Façade photographs?
2. Has Bestmont infringed such copyright?
3. What, if any, is the appropriate quantum of statutory damages?

PART IV: ARGUMENTS IN BRIEF

Issue 1: Copyright does not subsist in the Façade photographs

[16] Copyright protection extends only to works that are "original." To satisfy the originality requirement, the work in question must be the product of skill and judgment. Skill has been defined as "the use of one's knowledge, developed aptitude or practiced ability in producing the work." Judgment refers to "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." Ultimately, the exercise of skill and judgment must be more than trivial. If the work is the result of a purely mechanical exercise, the originality requirement will not be met.

Copyright Act, RSC 1985, c C-42, s 5 [*Copyright Act*].
CCH Canadian Ltd v Law Society of Upper Canada, 2004 SCC 13 at para 16 [*CCH*].

[17] Because Ms. Rer, at most, exercised skill and judgment only once in creating the Original Photos, copyright can—at best—subsist only in one of Ms. Rer's works. However, even if Ms.

Rer exercised skill and judgment on every occasion where she took a photograph of a Bestmont hotel, the merger doctrine applies to prevent copyright from subsisting in any of the ten Original Photos. Similarly, because Ms. Rer failed to exercise sufficient skill and judgment in selecting and applying filters from the public domain to the pre-existing Original Photos, copyright does not subsist in any of the forty Filtered Photos.

A. Copyright does not subsist in the Original Photos

i. Ms. Rer exercised skill and judgment only once in creating the Original Photos

[18] The Court of Appeal correctly noted that, at most, Ms. Rer exercised skill and judgment on a single occasion in developing a single concept and technique for all ten of the Original Photos. A photographer may exercise skill and judgment in choosing such things as the pose of the subject, the lighting, and the camera angles. When Ms. Rer took her first photograph of one of Bestmont's hotels, any skill and judgment that Ms. Rer may have exercised would have been limited to her choice of positioning and camera setup. But the originality requirement will not be satisfied where a photograph is the result of "slavish copying," or mere mechanical repetition. Ms. Rer admitted to using the "exact same technique and camera setup" for each of the nine subsequent Original Photos. Consequently, any skill and judgment that Ms. Rer may have exercised when creating the first Original Photo was absent when creating the subsequent nine Original Photos. She may have exerted considerable energy and effort in creating these other photographs, but this is—without more—insufficient to satisfy the originality requirement. The Supreme Court of Canada explicitly rejected the "sweat of the brow" test for originality.

> *Goldi Productions Ltd v Bunch*, 2018 CarswellOnt 15127 at para 18, 296 ACWS (3d) 827, citing *The Bridgeman Art Library Ltd v Corel Corporation* 36 F Supp (2d) 191 at 197 (SDNY Dist Ct 1999) [*Goldi*].
> *Trial*, *supra* para 8 at para 4.
> *Appeal, supra* para 14 at para 5.
> *CCH*, *supra* para 16 at para 24.

ii. Merger Doctrine prevents copyright from subsisting in the Original Photos

[19] It is trite law that Canadian copyright protection extends only to the expression of an idea and never to the idea itself. Merger doctrine is a "natural corollary" of this fundamental distinction between ideas and expressions. Where an idea can be expressed only in one way or in a limited number of ways, "it is said that the expression merges with the idea and thus is not copyrightable." To hold otherwise would be tantamount to giving a copyright holder a monopoly over the idea itself. Because there are only a limited number of ways to effectively showcase both Bestmont's marquee and hotel entrance in a single photographic frame, merger doctrine applies to prevent copyright from subsisting in the Original Photos.

Trader v CarGurus, 2017 ONSC 1841 at para 25 [*Trader*].
Delrina v Triolet Systems Inc, 2002 CarswellOnt 633 at paras 48–52, [2002] OJ No 676 [*Delrina*].

[20] Each of the Original Photos was taken directly in front of a Bestmont hotel at a distance of 100 feet. This distance, along with the positioning and angle of Ms. Rer's camera, ensured that each photographic frame represented both Bestmont's marquee and hotel entrance. It would be practically impossible to similarly represent in photographic form both the marquee and hotel entrance—the "idea"—without choosing a nearly identical combination of distance and camera setup—the "expression"—as that chosen by Ms. Rer. Accordingly, if copyright were to subsist in the Original Photos, Ms. Rer would hold a monopoly over the idea of depicting in a single photographic frame both Bestmont's hotel entrances and marquee. This is not and must not be allowed.

B. Copyright does not subsist in the Filtered Photos

i. Ms. Rer exercised insufficient skill and judgment in selecting and applying the filters

[21] The Court of Appeal correctly found that the selection and application of filters to the Original Photos was too trivial an exercise for copyright to subsist in the resulting Filtered

Photos. For a work to satisfy the originality requirement, the work must be the product of skill and judgment that is not "so trivial that it could be characterized as a purely mechanical exercise." An example of a purely mechanical exercise is changing the font of an existing work to produce a new work. Ms. Rer's selection and application of pre-existing social media filters simply changes the look of the underlying photograph the same way the selection and application of a new font changes the look of the underlying written text. While both exercises result in new works that are aesthetically distinct from the underlying works, neither exercise exhibits the level of skill and judgment that is required for copyright protection.

CCH, *supra* para 16 at para 16.

[22] The Appellant argues that the Court of Appeal erred by "focus[ing] on *how* the filtering software performed artistic effects on the photographs, instead of correctly asking *what function* the software was performing." This argument betrays a misunderstanding of the Court of Appeal's analysis. The Court was not suggesting that copyright could not subsist in the Filtered Photos simply because they were created with a stylistic software tool. The issue has nothing to do with whether a stylistic software tool is used or whether the action performed artistic effects. Rather, what is crucial is that the skill and judgment exercised not be so trivial that it could be characterized as a purely mechanical exercise. Because applying a filter—physically or digitally—is a purely mechanical exercise, it does not meet the necessary threshold for skill and judgment.

Factum of the Appellant, *Team 5A* at paras 32-33 [*Appellant Factum*].
CCH, *supra* para 16 at para 25.

ii. <u>The filters used by Ms. Rer are part of the public domain</u>

[23] Copyright does not subsist in the Filtered Photos because Ms. Rer exercised insufficient skill and judgment in trivially applying a widely utilized technique from the public domain.

Filters are readily available through various social media applications and photo editing software programs, both of which are widely utilized to enhance photographs. The application of a filter involves—at best—a trivial amount of skill and judgment, as evidenced by the fact that Bestmont easily applied other readily available filters. Common artistic techniques themselves are not eligible for copyright protection and must remain available to all to promote and encourage artistic creativity.

Appeal, *supra* para 14 at para 5.

Issue 2: Bestmont did not infringe copyright in the Façade photographs

[24] Even if copyright subsists in the Façade photographs, Bestmont's activities do not constitute infringement. Bestmont has not infringed copyright in the Original Photos because, pursuant to subsection 3(1) of the *Act*, Bestmont is entitled to reproduce the Original Photos. In addition, Bestmont has not infringed copyright in the Filtered Photos. Far from being substantial reproductions of the Filtered Photos, Bestmont's filtered hallway photographs are independent creations.

Copyright Act, supra para 16, s 3(1).

A. Bestmont did not infringe copyright in the Original Photos

i. Bestmont has the right to reproduce the Original Photos

[25] As the registered owner of copyright in the hotel designs and marquee, Bestmont has the sole right to produce and reproduce the hotel designs and marquee in any material form—including photographic form. This right derives from subsection 3(1) of the *Act*, which states that an owner of copyright can produce or reproduce the copyrighted work or any substantial part thereof in any material form whatever. The plain meaning of this provision illustrates Parliament's aim of protecting copyright owners by ensuring their just reward.

Copyright Act, *supra* para 16, s 3(1).

[26] The Appellant claims that subsection 3(1) does not grant Bestmont the exclusive right to reproduce photographs of its hotel designs and marquee, as photographs are "explicitly" excluded from subsection 3(1). This is incorrect. Subsection 3(1) is not an exhaustive list of the rights granted to a copyright owner. Further, despite the lack of the formal existence of the doctrine of derivative works in Canada, the broad language of subsection 3(1) is "wide enough to encompass" the exclusive right to control the preparation of derivative works. A derivative work is "a work based on or derived from one or more already existing works." Ms. Rer's Façade photographs clearly constitute works that are derivative of Bestmont's copyright in the hotel designs and marquee. Thus, Bestmont has the right to reproduce Ms. Rer's photographs, and any other derivative works for that matter.

> *Appellant Factum*, *supra* para 22 at para 39.
> William J Braithwaite, "Derivative Works in Canadian Copyright Law" (1982), 20:2 OHLJ 192 at 203 [*Braithwaite*].
> *Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34 at para 73 [*Théberge*].
> US Copyright Office, "Copyright in Derivative Works and Compilations" (last reviewed July 2020) at 1, online (pdf): *Copyrightgov* <www.copyright.gov/circs/circ14.pdf> [*Copyright Office*].

ii. Bestmont is immune from infringing copyright of permitted derivative works

[27] Even if Ms. Rer holds copyright in the Original Photos, she is not entitled to assert that copyright interest against the underlying copyright owner, Bestmont. The *Act* aims to balance the need to promote creativity with the need to protect copyright owners. Subsection 32.2(1) seeks to promote creativity by excluding photographs like Ms. Rer's from potential copyright infringement claims. However, if this provision were interpreted so as to allow Ms. Rer to assert her alleged copyright interest against Bestmont, Bestmont's ability to protect its copyright in the hotel designs and marquee would be negatively affected. In other words, such an interpretation would favour the need to promote creativity at the expense of the need to protect copyright owners like Bestmont. This would upset the delicate balance that the *Act* seeks to maintain.

Allowing Ms. Rer to seek compensation from Bestmont disproportionately favors Ms. Rer's copyright in the photographs over Bestmont's copyright in the hotel designs and marquee.

Copyright Act, *supra* para 16, s 32.2(1).

B. Bestmont did not infringe copyright in the Filtered Photos

i. Bestmont did not reproduce a substantial part of Ms. Rer's originality

[28] Infringement presupposes substantial copying of a copyrighted work's original expression. The Appellant cannot establish infringement by relying on similarity that arose from the use of filters that are readily accessible from the public domain and applied by millions of social media users every day. These filtering techniques are commonplace and unoriginal, like the use of iambic pentameter in Shakespeare's writing as noted by the Court in *Rains*. Common artistic techniques must remain in the public domain and are not eligible for copyright protection. The Appellant cannot rely on similarities resulting from public domain filters to establish copyright infringement.

Cinar Corporation v Robinson, 2013 SCC 73 at para 26 [*Cinar*].
Rains v Molea, 2013 ONSC 5016 at para 40 [*Rains*].

ii. Bestmont's filtered hallway photos are not identical

[29] It has not been established that Bestmont's filtered hallway photographs are identical copies of Ms. Rer's Filtered Photos. Bestmont created its filtered hallway photographs using a photo editing software that was totally distinct and separate from the social media platform used by Ms. Rer to create the Filtered Photos. While the filters on the photo editing software had the same *names* as the filters on the social media platform, there is no evidence that the filters were identical. While exact copying is not always required, "the simpler the copyrighted work, the greater the need to establish exact copying." Because Ms. Rer's Filtered Photos are relatively

simple, evidence of exact copying is required in this case to establish infringement. There is no such evidence.

Pyrrha Design Inc v Plum and Posey Inc, 2019 FC 129 at para 123 [*Pyrrha*].

iii. Bestmont's filtered hallway photos are independent creations

[30] A *prima facie* case of infringement may be established by demonstrating sufficient similarity and access to the work. However, *prima facie* infringement can be rebutted by showing that the infringing work is an independent creation. Bestmont may have reproduced the Original Photos, but it never reproduced the Filtered Photos. Bestmont applied commonly available filters to the Original Photos and, as a result, arrived at independently created photographs that happened to share a similar appearance with Ms. Rer's Filtered Photos.

Pyrrha, *supra* para 29 at para 122.

[31] In the alternative, Bestmont created an independent collection of 120 photographs, which constituted a unique expression that was entirely distinct from Ms. Rer's collection of 50 photographs. Bestmont did not solely use the four filters Ms. Rer used, but applied a total of eleven different filters and framed the photos. Bestmont used these photographs to decorate the hallways of their guest floors, expressing the beauty of their hotels and not to draw comparison between them—a completely different expression from the collection by Ms. Rer.

Issue 3: Ms. Rer can claim no more than $15,000 in total damages

A. The Court of Appeal correctly assessed statutory damages at $15,000

[32] If Bestmont infringed copyright in the Façade photographs, Ms. Rer is entitled to recover an award of statutory damages. Statutory damages are calculated by multiplying a dollar amount within the prescribed monetary range by the number of infringed works. Because Bestmont's activities were for a non-commercial purpose, the prescribed monetary range is $100-$5,000 per work ("non-commercial range"). Moreover, because Bestmont's conduct was not in bad faith,

and because deterrence is not a relevant factor under the circumstances, the dollar amount per work must fall toward the low end of the non-commercial range.

> *Copyright Act, supra* para 16, ss 38.1(1)(b), 38.1(5).
> *Patterned Concrete Mississauga Inc v Bomanite Toronto Ltd*, 2021 FC 314 at para 61 [*Bomanite*].

[33] In the alternative, if Bestmont's activities were for a commercial purpose—meaning the prescribed monetary range is $500-$20,000 per work ("commercial range")—this Court should nevertheless exercise its discretion under subsection 38.1(3) to award less than $500 per work. This is because the Façade photographs were produced in a single medium, and because awarding even $500 per photograph would be grossly disproportionate to Bestmont's alleged infringement.

> *Copyright Act, supra* para 16, ss 38.1(1)(a), 38.1(3).

i. Bestmont used its hallway photographs for a non-commercial purpose

[34] The Court of Appeal correctly found that Bestmont did not use its hallway photographs for a commercial purpose. Accordingly, any award of statutory damages is confined to the non-commercial range. The term "commercial" is not defined in the *Act* or in Canadian jurisprudence. However, in cases where courts have found that infringements were for a commercial purpose, the defendants invariably profited or attempted to profit from their infringing activities. Examples include the unauthorized sale of copies of copyrighted works, the sale of products that facilitated third party infringements of copyrighted works, and the unauthorized use of copyrighted works to sell or advertise the defendant's products or services.

> *Appeal, supra* para 14 at para 7.
> *Collett v Northland Art Company Canada Inc*, 2018 FC 269 at para 59 [*Collett*].
> *Thomson v Afterlife Network Inc*, 2019 FC 545 at para 62 [*Thomson*].
> *Bell Canada v L3D Distributing Inc (INL3D)*, 2021 FC 832 at para 95 [*Bell*].

[35] Bestmont neither profited nor intended to profit from its use of the Façade photographs. Bestmont did not sell or attempt to sell copies of the photographs. Nor did it sell or attempt to

sell anything that might allow others to infringe Ms. Rer's alleged copyright in the photographs. The Appellant argues that Bestmont used the Façade photographs to sell or advertise its own services. This argument ignores the fact that Bestmont explicitly rejected Mrs. Rer's proposal to use the photographs in its marketing materials. Moreover, even if Bestmont's hallway photographs had the effect of "improving the atmosphere for its paying guests," this had no discernable impact on Bestmont's ability to attract new or returning customers. Canadians choose Bestmont's hotels because of their locations and unique Façade designs, and to see the famed red marquee in person.

Appellant Factum, *supra* para 22 at para 47.
Trial, supra para 8 at paras 2, 7-8, 21.

ii. Bestmont's conduct was not in bad faith

[36] The Court of Appeal correctly found that Bestmont did not act in bad faith. This factor therefore cannot support an award of statutory damages toward either the top of the range or the mid-range. Bad faith conduct is that which is "contrary to community standards of honesty, reasonableness or fairness." In assessing whether or not Bestmont's conduct was dishonest, unreasonable, or unfair, the Court must adopt a contextual approach.

Appeal, supra para 14 at para 8.
Century 21 Canada Ltd Partnership v Rogers Communications Inc, 2011 BCSC 1196 at para 408 [*Century 21*].
Rallysport Direct LLC v 2424508 Ontario Ltd, 2020 FC 794 at para 10 [*Rallysport*].
Young v Thakur, 2019 FC 835 at para 50 [*Young*].

[37] Under the circumstances, Bestmont did not act dishonestly, unreasonably, or unfairly. Bestmont genuinely believed that it was entitled to reproduce the Façade photographs because of its registered copyright in the subject matter of those photographs—the marquee and hotel designs. Bestmont was also unaware of Ms. Rer's copyright claim until it was served with this application, at which point it promptly removed the hallway photographs from its hotels. Although Ms. Rer requested the return of the portable drive and later demanded that the hallway

photographs be taken down, on neither of these occasions did Ms. Rer make any reference to copyright. It therefore has not been established that Bestmont knew about, and intentionally ignored, a potential copyright infringement claim.

Appeal, supra 14 at para 8.
Trial, supra 8 at paras 7, 9-10.

[38] Even if Bestmont was put on notice concerning Ms. Rer's potential copyright infringement claim, it nevertheless did not act in bad faith. Ignoring a cease-and-desist letter does not necessarily indicate bad faith. In this case, it was neither unreasonable nor unfair for Bestmont to refuse to entertain Ms. Rer's demands. Bestmont genuinely believed that it could reproduce the Façade photographs and made this clear to Ms. Rer when it accused her of infringing its copyright in the hotel designs and marquee. Bestmont cannot be faulted for stating its legal position and later refusing to retreat from it. Furthermore, Bestmont did not engage in any infringing activity after receiving Ms. Rer's demand letter. The alleged infringement occurred when Bestmont reproduced the Façade photographs, not when it refused to remove its hallway photographs.

Young, supra para 36 at para 63.
Trial, supra para 8 at para 7.
Microsoft Corp v 1276916 Ontario Ltd, 2009 FC 849 at para 40 [*Microsoft*].

[39] Bestmont also did not act in bad faith by not giving any credit to Ms. Rer for its hallway photographs. Bestmont believed that Ms. Rer had infringed its copyright in the marquee and hotel designs; it did not tacitly condone what it believed was a violation of the *Act*.

Trial, supra para 8 at paras 7-8.

iii. Deterrence is not a relevant consideration under the circumstances

[40] The Trial Judge misapplied subsection 38.1(5)(c). In determining the appropriate quantum of statutory damages, a court is required to consider "the need to deter other infringements of the *copyright in question*" [emphasis added]. Because there is little to no risk

that the Façade photographs will be infringed in the future—either by Bestmont or by others—this factor points toward an award of statutory damages in the bottom of the non-commercial range.

Copyright Act, supra para 16, s 38.1(5)(c).

[41] There is no reason to assume that Bestmont might infringe the Façade photographs after trial. First, there is no "profit motive." Bestmont neither profited nor intended to profit from its use of the photographs. Second, this case does not present a need to deter open disrespect for Canada's copyright protection laws. Bestmont demonstrated its commitment to complying with the Court and its processes when it voluntarily removed the hallway photographs before trial. There is even less reason to assume that third parties might infringe the Façade photographs in the future. Because there is no evidence concerning the potential saleability or marketability of the Façade photographs, it would be speculative to suggest that third parties might be incentivized to start selling unauthorized copies of the photographs after trial.

Pinto v Bronfman Jewish Education Centre, 2013 FC 945 at para 202 [*Pinto*].
Appeal, supra para 14 at para 7.
Trial, supra para 8 at para 10.

[42] The Trial Judge also erred in concluding that there was a general need for deterrence. In the few cases where general deterrence was considered, the defendants were involved in illegitimate industries dedicated to copyright infringement. For example, in *Bell Canada v L3D Distributing Inc.*, the Court found a general need for deterrence because the 175 defendants were involved in a rapidly expanding industry that sold devices designed to provide users with unauthorized access to thousands of copyrighted television programs. By contrast, there is no evidence whatsoever concerning the frequency with which large corporations take advantage of vulnerable artists—if they do at all.

Trial, supra para 8 at para 24.
Bell, *supra* para 34 at para 104.

iv. This is a special case that justifies an award of less than $500 per photograph

[43] The Court of Appeal correctly concluded that, if the commercial range applies, this is a special case warranting an award of less than $500 per photograph. First, the Façade photographs were all contained in a single medium. A "medium" is simply a "means through which the user can access the photos." In this case, the Façade photographs were accessible via the single portable drive delivered by Ms. Rer to Bestmont.

Appeal, supra para 14 at paras 8-9.
Trader, *supra* para 19 at para 57.

[44] Second, awarding even $500 per photograph would result in a total award that is grossly disproportionate to Bestmont's alleged infringements. Statutory damages "are intended to compensate the copyright owner for its losses." For this reason, courts have consistently required a proportionality between statutory damages and actual or probable damages. In this case, Ms. Rer's actual or probable damages are minimal at best. Bestmont neither agreed nor intended to purchase a license for any of the Façade photographs. Moreover, there is no evidence concerning Ms. Rer's production, labour, or lost opportunity costs. There is also nothing to suggest that Bestmont's activities caused the Façade photographs to depreciate in value. In addition, because Bestmont did not profit in any way from its alleged infringements, Bestmont has not been unjustly enriched at Ms. Rer's expense. These considerations, when coupled with the absence of bad faith and any need for deterrence, indicate that it would be just to award no more than $15,000 in statutory damages.

Trader, *supra* para 19 at paras 56, 67.
Appeal, supra para 14 at para 9.
Rallysport, supra para 36 at paras 6-9, 24-28, 43.
Century 21, supra para 36 at para 421.

B. Punitive damages are inappropriate under the circumstances

[45] The Trial Judge erred in awarding punitive damages. Punitive damages are an exceptional remedy that should be awarded only when a defendant has engaged in "high-handed, malicious, arbitrary or highly reprehensible conduct that departs to a marked degree from ordinary standards of decent behaviour." Where a defendant has not engaged in bad faith conduct, punitive damages are inappropriate. Since Bestmont did not act in bad faith, the Trial Judge should not have awarded punitive damages. Even if Bestmont had acted in bad faith, its conduct was not so outrageous as to trigger an award of punitive damages. Bestmont reproduced the Façade photographs because it genuinely believed it was entitled to do so as the owner of copyright in the underlying marquee and hotel designs. Moreover, Bestmont voluntarily removed the hallway photographs before trial, demonstrating a desire to comply with Canadian copyright protection laws. Finally, Bestmont neither profited nor intended to profit from its alleged infringement.

Trial, supra para 8 at para 25.
Rallysport, supra para 36 at paras 45-47.
Trader, supra para 19 at para 68.

[46] In the alternative, if Bestmont's conduct has triggered an award of punitive damages, the Trial Judge erred by awarding an inappropriate quantum of $500,000. It is inappropriate to award punitive damages in an amount that "outstrips the amounts awarded in other cases… where the nature and extent of the misconduct by the individual defendants was more egregious." In *Collett v Northland Art Company Canada Inc.*, the defendant sold unauthorized copies of an artist's photograph into the same marketplace that the artist relied upon for his livelihood. To conceal its illegitimate activities, the defendant attributed its copies to another artist. The Court awarded a mere $25,000 in punitive damages.

Microsoft Corp v Liu, 2016 FC 950 at para 33 [*Liu*].

Collett, *supra* para 34 at paras 61, 73, 76.

[47] Bestmont's conduct was not nearly as egregious as that of the defendant in *Collett*. Bestmont never sold copies of—and never profited from its use of—Ms. Rer's photographs. Bestmont was also never under the impression that its activities were illegitimate. Moreover, unlike the plaintiff in *Collett*, Ms. Rer suffered no financial loss. Consequently, if punitive damages are warranted, an appropriate quantum would be far below $25,000.

PART V: ORDER REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 28th day of January, 2022.

Team 9

Counsel for the Respondent

PART VI: TABLE OF AUTHORITIES

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