

Federal Court



Cour fédérale

**Date: 20190620**

**Docket: T-494-18**

**Citation: 2019 FC 835**

**Ottawa, Ontario, June 20, 2019**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**MELODIE YOUNG AND MELXDIE  
ENTERTAINMENT INC.**

**Applicants**

**and**

**ROHIT THAKUR AND BADMASH FACTORY**

**Respondents**

**JUDGMENT AND REASONS**

[1] The Applicants, Melodie Young and Melxdie Entertainment Inc., allege that the Respondents, Rohit Thakur and Badmash Factory, infringed the Applicants' copyright and moral rights in a musical composition and its sound recording, contrary to the *Copyright Act*, RSC 1985, c C-42 [the Act].

[2] The Applicants seek an injunction, statutory damages, an order requiring the Respondents to deliver to the Applicants “all materials in the Respondents’ possession”, interest and costs.

[3] For the reasons that follow, the Application is allowed in part.

I. The Background

[4] Melodie Young [Ms. Young] is a singer and songwriter. She is the president of Melxdie Entertainment Inc. [Melxdie].

[5] Ms. Young collaborated with Thomas Tasker in early July 2017 to create a musical composition called “Secrets” [the Musical Work]. Ms. Young and Mr. Tasker registered the Musical Work on the Canadian Copyright Register on October 31, 2018 (registration number 1146877). Ms. Young entered a recording agreement with Melxdie to record the Musical Work. Ms. Young sang on the recording of the musical composition [the Sound Recording]. Melxdie registered the Sound Recording on the Canadian Copyright Register on October 31, 2018 (registration number 1146878). Although the Applicants refer to the composition and the sound recording collectively as the “Musical Works”, the definitions in the Act suggest that it is more accurate to refer to the composition as the Musical Work and the recording of it as the Sound Recording.

[6] The Respondent, Rohit Thakur, is a videographer and film maker who owns and operates Badmash Factory in the Greater Toronto Area.

[7] The Applicants responded to an advertisement for Badmash Factory on kijiji.ca. On July 13, 2017, Peter Maika, described only as a friend of Ms. Young, requested the Respondents' video production services for a music video to accompany the Musical Work and Sound Recording. Mr. Thakur agreed to film, edit, and revise the music video.

[8] The Respondents did not file a Notice of Intention to Appear in this Application and, as a result, did not defend this Application. However, Mr. Thakur prepared an affidavit which recounts, among other things, his relationship with the Applicants and the services he provided. Mr. Thakur prepared a second affidavit which answered the Applicants' questions regarding his first affidavit. The Applicants included Mr. Thakur's affidavits in their Application Record.

[9] The evidence on the record portrays very different accounts of the relationship between the parties and their understanding of their respective rights and obligations regarding the production of the music video.

[10] Mr. Thakur attests that he understood Mr. Maika to be the main contact person. However, Ms. Young also communicated directly with him from time to time, as did Mr. Tasker. No written contract was entered into between the Applicants and Respondents. There is no evidence that the parties discussed the copyright ownership or permission regarding the use of the Musical Work, Sound Recording, music video, or raw film footage.

[11] On July 16, 2017, Mr. Thakur met with Ms. Young and Mr. Tasker to discuss concepts for the music video. Ms. Young attests that Mr. Thakur assured her that he could work within

their one week timeline. Mr. Thakur attests that he told them that he could send them a video one week after the shoot but that a final video with the effects they requested would take longer.

[12] On July 18, 2017, Mr. Thakur filmed the music video with Ms. Young. Mr. Maika sent him the remaining balance of the agreed upon fee. Mr. Thakur states that after he began editing the footage, Mr. Tasker sent him a new version of the song which was significantly longer than the first one. As a result, the timing of the edited sequence no longer matched the Sound Recording. This required more work by Mr. Thakur.

[13] Mr. Thakur attests that on July 25, 2017, he sent Ms. Young and Mr. Tasker a password protected link to the first cut of the music video on Vimeo. Ms. Young and Mr. Tasker requested changes to the music video. Ms. Young attests that the Applicants paid an additional \$700 for a quick turnaround. Mr. Thakur states that no additional amount was paid and notes that there is no corresponding email transfer confirmation.

[14] On July 31, 2017, Mr. Tasker requested that the completed music video be provided “before dinner time” the same day. Mr. Thakur recounts that Mr. Maika offered him money to put this project ahead of projects for other clients but that he did not acknowledge this proposal. However, Ms. Young attests that Mr. Thakur told them that he required additional time and an additional \$600 because the visual effects were difficult to generate. Ms. Young states that the music video was not completed within the time promised. Mr. Thakur maintains that it was completed on July 31.

[15] Mr. Thakur recounts that upon completion of the music video, the Applicants and Mr. Maika expressed their approval of the final product. Mr. Thakur attests that Mr. Maika sent him \$600 as payment for the extra week of work after the changes to the video were requested. However, Ms. Young states that the music video was unsatisfactory and did not meet their expectations.

[16] On October 13, 2017, Ms. Young requested that the Respondents give her all the footage from the music video shoot because the Applicants wished to make further revisions. Mr. Thakur refused to do so because their agreement was only for the services he had provided, not the raw footage. Mr. Thakur attests that the rights to the footage had never been discussed. The Applicants and Respondents then began negotiations but no agreement was reached.

[17] At some point between the end of July and October, the Respondents uploaded the music video with the Sound Recording to Badmash Factory's website and made it available on Vimeo.

[18] The Applicants' lawyer sent Mr. Thakur a cease and desist letter dated January 10, 2018, alleging copyright infringement. The letter requested that the Respondents remove the Sound Recording from the video or, alternatively, assign all copyrighted videos and any material in his possession related to the video in exchange for a fee and a licence to promote the video. The Respondents did not remove the Sound Recording from the websites until the Applicants commenced this Application.

[19] In his affidavit, Mr. Thakur states that he “thought” that the Respondents had permission to use the song. Mr. Thakur asserts that Mr. Maika was aware that the Respondents intended to use the music video with the Sound Recording in their online portfolio. He points to his text messages to Mr. Maika which state, “I myself want to be happy with the final video for my portfolio as well.”

[20] Mr. Thakur also states that Ms. Young never prohibited him from using the Sound Recording with the music video. Ms. Young attests that she and Melxdie never authorized the Respondents to perform, reproduce, or distribute the Musical Work, Sound Recording, or the music video.

[21] At the date of the Notice of Application on March 14, 2018, the music video had been viewed 82 times on Badmash Factory’s Vimeo account.

## II. The Issues

[22] This Application raises the following issues:

1. Whether the Respondents infringed the Applicants’ copyright in the Musical Work and Sound Recording;
2. Whether the Respondents infringed the Applicants’ moral rights in the Musical Work and Sound Recording; and
3. Whether the Applicants are entitled to statutory damages and in what amount.

III. The Standard of Proof

[23] Although the Respondents have not defended this Application, the Applicants still must establish the infringement and entitlement to the relief sought on a balance of probabilities.

[24] As I found in *Thomson v Afterlife Network Inc*, 2019 FC 545 at paras 31-32, [2019] FCJ No 483, the Respondents' failure to participate makes the application analogous to a default judgment. As noted by Justice Rennie in *Cuzzetto v Business in Motion International Corporation*, 2014 FC 17 at para 4, 445 FTR 261:

On a motion for default judgment where no defence has been filed, every allegation in the statement of claim must be taken as denied. Evidence must be led that enables the Court to find, on a balance of probabilities, that there is liability and that the plaintiff is entitled to the remedies sought.

IV. The Respondents Infringed the Applicants' Copyright

[25] Subsection 27(1) of the Act provides that “[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.”

[26] Subsection 3(1) provides that copyright means the sole right to produce or reproduce; perform in public; or, if unpublished, publish a work. Copyright also includes the right to authorize such acts. The Act further describes the rights included in the copyright in relation to musical works or sound recordings.

[27] The Applicants owned the copyright in the works. Ms. Young is an author of the Musical Work and Melxdie is the maker of the Sound Recording. The evidence establishes on a balance of probabilities that the Applicants had the sole right to produce, reproduce, or perform the Musical Work and Sound Recording.

[28] The Applicants allege only that the Respondents “performed” the works for the public. However, the Applicants have used imprecise language to describe the Respondents’ actions which underlie their allegations. “Performance”, as defined in the Act, is impermanent in nature and, unlike reproduction, does not involve making copies (*Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 at paras 35-38, [2012] 2 SCR 231). “Performance” does not accurately describe the Respondents’ actions in posting the music video, including the Sound Recording embodying the Musical Work. The Respondents made copies of the Musical Work and Sound Recording by uploading the music video online. The Applicants’ allegation is in essence that the Respondents reproduced the Musical Work and Sound Recording.

[29] The evidence establishes on a balance of probabilities that the Respondents reproduced the Musical Work and Sound Recording by posting them, as part of the music video, on Vimeo and on Badmash Factory’s website.

[30] The evidence also establishes on a balance of probabilities that the Applicants did not authorize anyone else reproduce the Musical Work or Sound Recording. The Applicants provided the Sound Recording to the Respondents only for the purpose of producing the music

video. Mr. Thakur asserts that he thought he had permission to use, or at least had not been prohibited from using, the Sound Recording with the music video in his portfolio. However, his affidavit, which appends as an exhibit a draft agreement regarding the film footage, suggests that he is aware of basic copyright principles. Although the evidence conflicts in several respects and there was confusion about who was the point person for this project, the evidence does not establish that the Respondents were authorized to perform the Musical Work or Sound Recording. Moreover, upon receiving the cease and desist letter in January 2018, Mr. Thakur was clearly made aware that he did not have permission to use the Musical Work or Sound Recording and he did not take down the music video at that point.

V. The Respondents Did Not Infringe the Applicants' Moral Rights

[31] In their written submissions, the Applicants allege that the Respondents' use of the Musical Work and Sound Recording infringed the Applicants' moral right to the integrity of the work, pointing to sections 14.1, 17.1, and 28.1 of the Act.

[32] Subsection 14.1(1) of the Act provides that the author of a work has the right to the integrity of the work, to be associated with the work as its author, and to remain anonymous. Subsection 17.1(1) provides equivalent rights, specifically in association with a performer's performance. Section 28.1 provides that any act or omission that is contrary to any of the moral rights of the author or performer without their consent is an infringement.

[33] Subsection 28.2(1) of the Act provides that moral rights to the integrity of a work are infringed where the author's or performer's honour or reputation is prejudiced by the distortion

or modification of the original work or by using the work in association with a product, service, cause or institution.

[34] The jurisprudence has established that there is both a subjective and objective aspect to the test to establish infringement of moral rights. The author or performer of the works may provide evidence to establish subjectively how their honour or reputation has been affected, but there must also be objective evidence of the prejudice (*Collett v Northland Art Company Canada Inc*, 2018 FC 269 at para 22, [2018] FCJ No 349 (QL); *Maltz v Witterick*, 2016 FC 524 at para 49, [2016] FCJ No 484 (QL); *Prise de parole Inc v Guérin Éditeur Ltée* (1995), 66 CPR (3d) 257, 104 FTR 104 (TD), aff'd (1996), 73 CPR (3d) 557, [1996] FCJ No 1427 (QL) (CA)).

[35] The burden of proof lies on the party seeking to establish an infringement of moral rights. The Applicants provided no evidence or argument to support their allegation of infringement of their moral rights.

## VI. An Injunction is Warranted

[36] An injunction in accordance with section 34 of the Act is a typical remedy for copyright infringement. Despite the fact that the Respondents have taken down the music video from the websites, an injunction is warranted to ensure that the Respondents do not repost it and infringe the Applicants' copyright in the Musical Work and Sound Recording.

[37] The Applicants clarified at the hearing of this Application that they are not also seeking a wide injunction pursuant to subsection 39.1(1) of the Act. As acknowledged by the Applicants,

the criteria for a wide injunction are not met; there is no evidence that the Respondents will likely infringe the Applicants' copyright in other works.

VII. The Applicants Are Entitled to Statutory Damages

[38] The Applicants have elected to seek statutory damages for the infringement of their copyright.

[39] Paragraph 38.1(1)(a) provides:

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally,

(a) in a sum of not less than \$500 and not more than \$20,000 that the court considers just, with respect to all infringements involved in the proceedings for each work or other subject-matter, if the infringements are for commercial purposes; and

38.1 (1) Sous réserve des autres dispositions du présent article, le titulaire du droit d'auteur, en sa qualité de demandeur, peut, avant le jugement ou l'ordonnance qui met fin au litige, choisir de recouvrer, au lieu des dommages-intérêts et des profits visés au paragraphe 35(1), les dommages-intérêts préétablis ci-après pour les violations reprochées en l'instance à un même défendeur ou à plusieurs défendeurs solidairement responsables :

a) dans le cas des violations commises à des fins commerciales, pour toutes les violations — relatives à une œuvre donnée ou à un autre objet donné du droit d'auteur —, des dommages-intérêts dont le montant, d'au moins 500 \$ et d'au plus 20 000 \$, est déterminé selon ce que le tribunal estime équitable en l'occurrence;

[Emphasis added]

[40] The Applicants submit that the maximum amount of \$20,000 per infringement should be awarded. The Applicants suggest that every view of the music video on Badmash Factory's website and Vimeo account constitutes a separate infringement. The Applicants suggest that there have been at least 82 infringements because that is the number of views of the video on the Respondents' Vimeo account. The Applicants seek an award of statutory damages of \$1,640,000.

[41] Contrary to the Applicant's submission, the jurisprudence has established that statutory damages are assessed on a per work infringed basis. In other words, statutory damages are awarded based on the number of works infringed. They are assessed with respect to "all infringements involved in the proceedings for each work".

[42] In *Nintendo of America Inc v King*, 2017 FC 246 at paras 138, [2018] 1 FCR 509, the Court noted:

Second, a work-based award is more harmonious with the wording of the Act. Subsection 41.1(4) provides that the "owner of the copyright in a work" is entitled to all remedies. If the owner of a single work may claim all remedies for infringement of that one work, it follows that the owner of multiple works is entitled to a separate remedy for each infringed work. This is also consistent with the wording in s. 38.1(1), which provides remedies for infringement of "each work or other subject matter".

[43] In *Microsoft Corporation v 1276916 Ontario Ltd*, 2009 FC 849, [2009] FCJ No 1023 (QL) [*Microsoft Corporation*], the Court noted the jurisprudence on the assessment of statutory damages at paras 37-39:

[37] A number of cases have now considered section 38.1 and granted statutory damages. There are three decisions that are noteworthy for present purposes. The first is the decision of Harrington J. in *Microsoft v. 9038-3746 Quebec Inc.*, 2006 FC 1509, Harrington J. awarded the maximum permitted statutory damages of \$20,000 per work for each of the 25 computer programs that had been infringed for a total of \$500,000 in statutory damages, as well as punitive damages.

[38] The second decision is the subsequent decision of Snider J. in *Louis Vuitton Malletier S.A. v. Yang*, 2007 FC 1179. Snider J., after reviewing the applicable factors, awarded the maximum statutory damages of \$20,000 for each of the two works infringed.

[39] The third decision is my decision in *Microsoft Corporation v. PC Village Co. Ltd.*, 2009 FC 401. It also involved a motion for default judgment. The underlying infringement in the action also related to the sale of computers with unauthorized copies of Microsoft computer programs. After reviewing the applicable factors I awarded statutory damages of \$10,000 each per work infringed for a total of \$150,000.

[44] In the present case, the Musical Work and Sound Recording, which are separate works for the purpose of copyright (*Pinto v Bronfman Jewish Education Centre*, 2013 FC 945 at para 130, 439 FTR 70), have been infringed by the Respondents' action of posting it to its website and Vimeo account. In this case, Ms. Young and Mr. Tasker own the Musical Composition and Melxdie owns the Sound Recording. Two works have been infringed. The number of views on the website does not multiply the works infringed.

[45] Statutory damages should be assessed within the range of \$500 to \$20,000 per work infringed where the infringement is for commercial purposes. The Respondents' infringement was for a commercial purpose given their evidence that they used the Sound Recording with the music video in an online portfolio to advertise their services, even if the Respondents did not make any profit.

[46] Determining the amount of statutory damages within the range is a case by case assessment guided by the applicable statutory provisions and by the jurisprudence.

[47] The Applicants point to *Attorney General of Canada v Rundle*, 2014 ONSC 2136, 119 CPR (4th) 225 [*Rundle*] and *Microsoft Corporation* to support their submission that the maximum amount of \$20,000 within the statutory range should be awarded because the Respondents did not cease after receipt of a cease and desist letter. The Applicants did not offer any analysis of the cases cited or point to other jurisprudence to guide the assessment of statutory damages. In the two cases cited by the Applicants, the Court did not award the maximum. In *Rundle*, the Court awarded \$7,500 for some works infringed and \$15,000 for other works infringed. In *Microsoft Corporation*, the Court ordered \$10,000 per work infringed. In both cases, the circumstances were not analogous to the present circumstances.

[48] In *Rundle*, the Court canvassed several cases where varying amounts of statutory damages were awarded, providing a summary at paras 10-15:

[10] In *Microsoft Corporation v. 9038-3746 Quebec Inc., 9014-5731 Quebec Inc. v. Adam Cerrelli and Carmelo Cerrelli*, 2006 FC 1509, Harrington J. granted the maximum statutory damages for each of the twenty-five infringements for a total of \$500,000 from three Defendants where the Defendants' estimated profit was 1.8 million dollars.

[11] In *Louis Vuitton Malletier S.A. and Louis Vuitton Canada Inc. v. Lin Pi-Chu Yang et al. doing business as K2 Fashions, Yan et al.*, 2007 FC 1179 (CanLII), Snider J. awarded the maximum amount for two infringements for a total of \$40,000, plus punitive damages of \$100,000 on an estimated annual profit of between \$90,000 to \$135,000 over an eighteen month period.

[12] In *Trout Point Lodge Ltd. v. Handshoe* 2014 NSSC 62 Coady J. granted the maximum amount for each of the four infringing photographs for a total of \$80,000, plus punitive

damages of \$100,000 where the Defendant had used the photos in the context of an internet campaign to damage, harass and embarrass the Applicants in breach of a court order.

[13] In *Louis Vuitton Malletier S.A. and Louis Vuitton Canada, Inc. v. 486353 B.C. Ltd.*, 2008 B.C.S.C. 799, Boyd J. awarded the maximum amount for each of five infringements, plus punitive damages totaling \$100,000 against the three Defendants and \$200,000 against another Defendant. In this case the Defendants continued to sell counterfeit goods from at least four locations for several years in direct breach of a court order.

[14] In *Setanta Sports Canada Limited v. 840341 Alberta Inc.*, 2011 FC 799, O'Reilly J. awarded \$10,000 for each of two breaches where the Defendants infringed on the Plaintiff's copyright respecting pay per view broadcasts of sporting events.

[15] In *Microsoft Corporation v. 1276916 Ontario Limited et al.*, 2009 FC 849, Mandamin J. awarded statutory damages of \$10,000 for each of eight infringements and punitive damages of \$50,000 in an undefended action after a cease and desist letter was sent and where the infringement activity continued after the action was commenced.

[49] In *Rundle*, the defendant was found to have infringed the copyright in Government of Canada language tests, which the defendant had provided to her students. As a result, many students were highly successful on their test scores. The defendant's conduct undermined the integrity of the language evaluation process. Replacement tests were developed, at significant cost to the Government. The defendant also infringed the copyright in the replacement tests. In assessing the appropriate amount of statutory damages, the Court noted that although the defendant operated a business, there was no information regarding the profits generated by the infringing activity and no clear evidence that the infringing activity continued after an injunction was issued. The Court noted that profits gained through infringing activity and continuing the infringing activity after a Court order are both aggravating factors.

[50] As can readily be seen from the summary above, where the Courts have awarded amounts toward the top of the range, or even in the mid-range, the infringements have tended to be extremely serious and there have been aggravating factors, including repeated infringement, profits to the infringer, flagrant violation of the Court order and other conduct.

[51] Although the Applicants have elected only statutory damages, they suggest that there should be a punitive aspect to the determination of the amount. The Applicants allege that the Respondents' conduct, including their failure to respect the cease and desist letter, to provide an address for service of documents and to respect the Court process, should be considered and should justify the high end of the range.

[52] This muddles two different concepts regarding damages. Punitive damages have not been sought, nor would they be warranted. Punitive damages are exceptional. They are awarded where a party's conduct has been malicious, oppressive and highhanded and offends the court's sense of decency and where other remedies are not sufficient to accomplish the objectives of retribution, deterrence, and denunciation (*Whiten v Pilot Insurance Co*, 2002 SCC 18 at paras 36, 123, [2002] 1 SCR 595). In the present case, the injunction and the statutory damages are sufficient to deter and denounce the Respondents' infringing conduct.

[53] The Applicants' Counsel argued that Ms. Young incurred a significant financial loss because she had to abandon the video and start again and that this has impacted the launch of her music career. The Applicants suggest that the loss incurred should be considered in the assessment of statutory damages.

[54] First, although there has been some commentary regarding a correlation between statutory damages and actual damages, statutory damages are determined with regard to several factors.

[55] The basic principle is that in assessing statutory damages, the Court should reach a reasonable assessment based on all of the circumstances in order to yield a just result: *Telewizja Polsat SA v Radiopol Inc*, 2006 FC 584 at para 37, [2007] 1 FCR 444 [*Telewizja*].

[56] In *Telewizja* at para 45, Justice Lemieux cited John McKeown, *Fox on Canadian Law of Canadian Copyright and Industrial Design*, 4<sup>th</sup> ed (Scarborough: Thomson Carswell, 2003) at 24.77, noting that “[t]here should be some correlation between actual damages and statutory damages even though section 38.1 does not speak of actual damages”.

[57] However, in Ronald Dimock, *Intellectual Property Disputes: Resolutions & Remedies* (Toronto: Thomson Reuters Canada, 2016) (loose-leaf revision 5), ch 3 at 3-38, authors commented on *Telewizja*, saying that a correlation between probable and statutory damages is not determinative and suggesting only that it may be helpful in ensuring fairness and proportionality:

While statutory damages are meant to compensate a party for losses that are difficult to quantify, the Court in *Telewizja Polsat S.A. v. Radiopol Inc.* stated that, in attempting to establish the amount of any statutory damages award, the amount of actual damages the plaintiff would have probably received should be considered. In looking at probable losses, Justice Lemieux was guided by American jurisprudence and commentary in *Fox on Canadian Copyright and Industrial Design*. On first glance, this focus on probable losses blurs the distinction between statutory damages and damages at large, which are otherwise available.

However, any estimation of probable damages is not determinative and the use of such estimates in determining statutory damages is likely intended as one means of ensuring that any damages award is fair and proportionate.

[58] In my view, there should remain a distinction between other heads of damages and statutory damages. In the present case, as noted, the Applicants have not even provided evidence regarding the damages incurred which would permit the Court to consider the relative proportionality of statutory damages.

[59] Second, the submissions of Counsel regarding Ms. Young's financial losses are not evidence. Counsel cannot give evidence. There is no evidence on the record regarding such losses. The Applicants have not made a claim for other damages, and none have been established.

[60] The Court has discretion to award statutory damages and must determine what amount of statutory damages will yield a just result. A just result is fair and proportionate based on the factors set out in subsection 38.1(5) and the jurisprudence which the Court has considered.

[61] Subsection 38.1(5) provides:

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|---|--|
| (5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including | (5) Lorsqu'il rend une décision relativement aux paragraphes (1) à (4), le tribunal tient compte notamment des facteurs suivants : |
| (a) the good faith or bad faith of the defendant;   | a) la bonne ou mauvaise foi du défendeur;  |
| (b) the conduct of the parties  | b) le comportement des parties   |

before and during the proceedings;	avant l'instance et au cours de celle-ci;
(c) the need to deter other infringements of the copyright in question; and	c) la nécessité de créer un effet dissuasif à l'égard de violations éventuelles du droit d'auteur en question;
(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.	d) dans le cas d'une violation qui est commise à des fins non commerciales, la nécessité d'octroyer des dommages-intérêts dont le montant soit proportionnel à la violation et tienne compte des difficultés qui en résulteront pour le défendeur, du fait que la violation a été commise à des fins privées ou non et de son effet sur le demandeur.

[62] The relevant factors to consider in this case include the good faith or bad faith of the Respondents, the conduct of the parties before and during the proceedings, and the need to deter other infringements of the copyright in question.

[63] The conflicting evidence does not establish that there was bad faith by the Respondent. Rather, it indicates much confusion and a lack of professionalism and clarity by both parties in their arrangement for the production of the music video. The evidence demonstrates that Mr. Maika, who is only described as a friend of Ms. Young, retained Mr. Thakur's services and made some payments. However, Mr. Tasker, Ms. Young and Mr. Maika were all in communication with Mr. Thakur and he received mixed signals regarding the video. The evidence also shows that attempts were made by Mr. Thakur and the Applicants to resolve the copyright dispute and the raw footage issue, which does not suggest bad faith on the part of the

Respondents. However, the Respondents did not remove the video upon receipt of the cease and desist letter in January 2018, which made the Applicants' allegations of breach of copyright clear. The Respondents, however, did remove the video after this Application was served on them. Although the infringement was for a commercial purpose, the Respondents attest that they did not make any profit and there is no evidence that they did.

[64] No aggravating factors have been established which are similar to those noted in the jurisprudence where the Courts have awarded statutory damages at the higher end of the range. Based on the court's assessment of the relevant factors and the principle that the amount should yield a just result, the statutory damages are assessed at \$1000 per work infringed.

[65] As explained above, statutory damages are awarded per work infringed. Two works were infringed: the Musical Composition, the copyright of which belongs to Ms. Young and Mr. Tasker, and the Sound Recording, the copyright of which belongs to Melxdie. Therefore, statutory damages in an amount of \$2000 are warranted.

#### VIII. Other Remedies Are Not Warranted

[66] The Applicants also seek an order requiring the Respondents to deliver up "all materials in the Respondents' possession, custody, control or power", pursuant to section 38. The Applicants' Counsel clarified that the Applicants are seeking the raw footage from the music video shoot. Section 38 provides for the recovery of infringing copies of works. The only thing the Applicants are entitled to is the Musical Work and Sound Recording. The Applicants have

not established that they have any rights to the film footage. The Applicants cannot obtain a remedy which is not related to the infringement.

IX. Costs

[67] Generally, costs are awarded to the successful party. The Applicants have been partly successful. The Applicants' Counsel submitted orally that Ms. Young had incurred \$25,000 in legal costs. However, no supporting evidence has been provided to the Court. The amount of costs is within the Court's discretion. Taking into account all the circumstances, including the relief sought by the Applicants and the relief awarded, I find that \$2,500 is a more appropriate amount.

**JUDGMENT in T-494-18**

**THIS COURT'S JUDGMENT is that:**

1. The Application is allowed in part.
2. The Respondents have infringed the Applicants' copyright in the Musical Work and Sound Recording.
3. The Respondents shall be permanently enjoined from infringing the copyright of the Applicants in the Musical Work and Sound Recording.
4. The Respondent shall forthwith pay the amount of \$2,000 representing statutory damages in accordance with section 38.1 of the *Copyright Act*, RSC 1985, c. C-42.
5. The Respondent shall pay the costs of the Applicants in the amount of \$2,500.

"Catherine M. Kane"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-494-18

**STYLE OF CAUSE:** MELODIE YOUNG AND MELXDIE  
ENTERTAINMENT INC. v ROHIT THAKUR AND  
BADMASH FACTORY

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 12, 2019

**JUDGMENT AND REASONS:** KANE J.

**DATED:** JUNE 20, 2019

**APPEARANCES:**

Eboue Reinbergs FOR THE APPLICANTS

None FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

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None FOR THE RESPONDENTS