

Federal Court



Cour fédérale

**Date: 20210412**

**Docket: T-1845-17**

**Citation: 2021 FC 314**

**Ottawa, Ontario, April 12, 2021**

**PRESENT: Madam Justice Pallotta**

**BETWEEN:**

**PATTERNED CONCRETE MISSISSAUGA INC.**

**Plaintiff**

**and**

**BOMANITE TORONTO LTD.**

**Defendant**

**JUDGMENT AND REASONS**

**I. Overview**

[1] Patterned Concrete Mississauga Inc. (Patterned Concrete) builds decorative concrete patios, paths, and driveways for residential customers. It commenced an action for copyright infringement alleging that its competitor, Bomanite Toronto Ltd. (Bomanite), infringed the copyright subsisting in a quotation form (Quotation), a contract form (Contract), and a limited warranty certificate (Warranty) used in connection with Patterned Concrete's business

(collectively, the Works). Patterned Concrete now moves for summary judgment in its favour on all issues of copyright infringement raised in the action, alleging there are no genuine issues that would require a trial. It seeks an order enjoining Bomanite from infringing copyright in the Works, and requiring Bomanite to pay statutory damages for past infringement under section 38.1 of the *Copyright Act*, RSC 1985, c C-42 [*Copyright Act*].

[2] Patterned Concrete alleges that copyright subsists in the Works as they resulted from the exercise of considerable skill and judgment by the author, Dino Padula, a co-owner of the company. According to Patterned Concrete, about two years after one of its long-time employees accepted a position with Bomanite, it learned Bomanite was using a quotation form, contract form, and limited warranty certificate that substantially reproduced the Works. Patterned Concrete submits that Bomanite had access to Works, and that a comparison of the Works and Bomanite's forms demonstrates substantial similarity between them. It submits Bomanite failed to prove facts to substantiate any affirmative defence. Thus, Patterned Concrete submits it has met its onus to establish that copyright subsists in the Works and that Bomanite has infringed copyright.

[3] Bomanite argues the motion should be dismissed on the basis that Patterned Concrete failed to establish that the Works originated from Mr. Padula or that they were the product of a non-trivial exercise of skill and judgment. According to Bomanite, the Works were created in 2008/2009 as a revision of earlier forms that are not in evidence, and Patterned Concrete has failed to establish that the alleged similarities between the Works and Bomanite's forms relate to aspects of the Works that Mr. Padula authored. Furthermore, Bomanite submits the Works are

standard business forms lacking sufficient originality for copyright to subsist, and the content of the contested Bomanite forms can be traced to earlier versions of Bomanite's own contract, quotation, and warranty forms. Also, while Bomanite denies it has infringed any copyright belonging to Patterned Concrete, it submits Patterned Concrete is not entitled to an injunction or other relief because Bomanite has voluntarily changed to new forms that Patterned Concrete acknowledges are non-infringing.

[4] Summary judgment is available where there is no genuine issue for trial. There is no genuine issue for trial if the motions judge can make necessary findings of fact and apply the law to the facts, and if the summary judgment process is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak v Mauldin*, 2014 SCC 7 at para 49; *Apotex Inc v Pfizer Inc*, 2016 FC 136 [*Apotex*] at para 31. Where the record before the motions judge does not permit the judge to make the necessary findings of fact, or where it would be unjust to do so, the motion for summary judgment should be dismissed: *Milano Pizza Ltd v 6034799 Canada Inc*. 2018 FC 1112 at para 36. However, the parties are expected to put their best evidence forward, and the motions judge is entitled to assume that no new evidence would be presented if the issues were to go to trial: *Apotex* at para 31.

[5] I find there are no genuine issues that would require a trial in this proceeding, and I find that summary judgment is an appropriate process to achieve a just result. For the reasons below, the motion for summary judgment is granted. Patterned Concrete has established that copyright subsists in the Works, it owns such rights, and Bomanite infringed copyright in the Works. Patterned Concrete is entitled to an injunction and statutory damages.

II. **Issues**

[6] On this motion for summary judgment, the issues are:

1. Does copyright subsist in the Works, and is it owned by Patterned Concrete?
2. If so, did Bomanite infringe copyright in the Works?
3. If so, what is the appropriate remedy?

III. **Analysis**

A. *Issue 1: Does copyright subsist in the Works, and is it owned by Patterned Concrete?*

[7] In addition to Mr. Padula's affidavit evidence, Patterned Concrete relies on statutory provisions of the *Copyright Act* to assist in proving that copyright subsists in the Works, and that Patterned Concrete is the owner. Before turning to the analysis of whether Patterned Concrete has established ownership and subsistence of copyright in the Works, I will address the parties' submissions regarding whether Patterned Concrete may rely on the statutory provisions.

[8] Patterned Concrete applied to register copyright in the Quotation, Contract, and Warranty forms, and introduced the resulting certificates of registration as evidence that copyright subsists in the Works and that Patterned Concrete is the copyright owner. Sections 53(1) and (2) of the *Copyright Act* state:

**Register to be evidence**

**53 (1)** The Register of Copyrights is evidence of the particulars entered in it, and a copy of an entry in the Register is evidence of the

**Preuve**

**53 (1)** Le registre des droits d'auteur, de même que la copie d'inscriptions faites dans ce registre, certifiée conforme par le commissaire

particulars of the entry if it is certified by the Commissioner of Patents, the Registrar of Copyrights or an officer, clerk or employee of the Copyright Office as a true copy.

**Owner of copyright**

(2) A certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright.

aux brevets, le registraire des droits d'auteur ou tout membre du personnel du Bureau du droit d'auteur, fait foi de son contenu.

**Titulaire du droit d'auteur**

(2) Le certificat d'enregistrement du droit d'auteur constitue la preuve de l'existence du droit d'auteur et du fait que la personne figurant à l'enregistrement en est le titulaire.

[9] Patterned Concrete's applications for registration were not filed contemporaneously with the publication of the Works in 2009. According to his affidavit, Mr. Padula instructed counsel to obtain copyright registrations at the time he instructed counsel to put Bomanite on notice of the allegedly infringing activities. The certificates indicate dates of registration between June 13, 2017 and June 22, 2017, and Patterned Concrete's initial demand letter to Bomanite is dated June 14, 2017.

[10] Bomanite relies on the timing of Patterned Concrete's applications to argue that Patterned Concrete obtained the certificates in contemplation of litigation, rather than in the ordinary course of business. It argues that Patterned Concrete cannot rely on section 53 if the copyright registrations were obtained for the purpose of litigation rather than in the ordinary course of business, citing *P.S. Knight Co. Ltd. v Canadian Standards Association*, 2018 FCA 222 [*P.S. Knight (FCA)*] at paragraph 150. Patterned Concrete counters that there is no evidence it is a litigious company, and no merit to Bomanite's assertion that the certificates were obtained for

the purpose of litigation. It submits there is no basis for finding that section 53 of the *Copyright Act* does not apply.

[11] In my view, *P.S. Knight (FCA)* does not establish a rule that section 53 of the *Copyright Act* will only apply if a certificate of registration was obtained in the ordinary course of business, and not in contemplation of litigation. In that case, the Federal Court of Appeal held (reversing the Federal Court's finding on this point) that the certificate of registration in question was, in fact, obtained in the ordinary course of business, and the plaintiff was entitled to rely on it as evidence of ownership under subsection 53(2) of the *Copyright Act*. Thus, the Federal Court of Appeal did not need to decide whether section 53 only applies to certificates of registration obtained in the ordinary course of business. There was no analysis of the language of that section, and while "ordinary course of business" and "in contemplation of litigation" are terms that have legal meaning, those terms do not appear in the *Copyright Act*. In my view, *P.S. Knight (FCA)* did not set down a general rule as Bomanite asserts.

[12] Furthermore, I am not satisfied that the circumstances of this case warrant giving no effect to the certificates as evidence of the subsistence of copyright and its ownership. There is no evidence that Bomanite sought to challenge the validity of the registrations, and I am not satisfied that the timing of Patterned Concrete's applications render the resulting certificates so unreliable that they would not constitute at least *prima facie* evidence that copyright subsists in the Works, and that Patterned Concrete owns such copyright. Mr. Padula was asked on cross-examination whether he only obtained certificates of registration for purposes of pursuing litigation and he answered, "No. I wanted to stop anybody else from using them. I just wanted

the copyright. I felt that I should have had it in the past, I didn't know it was necessary." Thus, he gave evidence explaining he had not understood the necessity.

[13] Certificates of registration may not be strong evidence of the subsistence of copyright or its ownership, but that is a question of weight. For example, the Supreme Court of Canada in *Circle Film Enterprises Inc. v Canadian Broadcasting Corporation*, [1959] SCR 602 [*Circle Film*] at 606 held that where there is evidence to contradict a copyright certificate, then its weight may be affected; however, in the absence of any such evidence, the weight afforded to the certificate should not be minimized merely because an application for registration of copyright requires no proof of title and because the Copyright Office assumes no responsibility for the truth of the facts asserted in the application and conducts no independent examination. In that case, the Supreme Court held that the certificate constituted sufficient evidence to displace a legal presumption that the author of the work, rather than the plaintiff, owned the copyright in the work in question, and the certificate was sufficient to satisfy the plaintiff's onus of proof.

[14] As another example, in *CCH Canada Ltd. v Law Society of Upper Canada*, 2002 FCA 187 at paragraph 63 the Federal Court of Appeal held that certificates seemingly obtained in contemplation of litigation may support a finding that copyright subsists in the works described on the certificates, but may have diminished persuasiveness and may not constitute particularly compelling evidence.

[15] I agree with *Patterned Concrete* that there is no basis for finding section 53 of the *Copyright Act* does not apply. In my view, the circumstances that led to *Patterned Concrete's*

applications for registration are factors that should be considered in weighing all of the evidence tending to prove or disprove the subsistence of copyright and its ownership.

[16] Patterned Concrete also relies on the statutory presumptions of section 34.1 of the *Copyright Act*. In any civil proceeding where the defendant puts in issue either the existence of copyright or the plaintiff's title to it, section 34.1(1)(a) provides that copyright shall be presumed to subsist in the work unless the contrary is proved, and section 34.1(2) provides that where a name purporting to be that of the owner is printed on a work, the person whose name is printed is presumed to be the owner of the copyright in question unless the contrary is proved. Patterned Concrete submits that it may rely on section 34.1(2)(b), because its name is printed on the Quotation, Contract, and Warranty forms: *P.S. Knight (FCA)* at para 149. I agree. The evidence establishes that Patterned Concrete's name was printed on the Works at all material times.

[17] I note that in this case, the legal effect of sections 34.1 and 53 of the *Copyright Act* are aligned—that is, both would support that copyright subsists in the Works, and that Patterned Concrete is the owner of such copyright.

[18] I will now turn to consider the other evidence, and the parties' arguments, regarding the subsistence and ownership of copyright in the Works.

[19] Patterned Concrete relies on Mr. Padula's affidavit testimony. Mr. Padula testified that he authored the Works in 2008, and at the time, he was a Canadian citizen, resident in Canada, and acting in the course of his employment with Patterned Concrete. He testified that the Works

were initially published in 2009 and have been used by Patterned Concrete in substantially the same form since then.

[20] Patterned Concrete asserts that Mr. Padula's detailed evidence demonstrates that he exercised considerable skill and judgment in the expressive element of the Works, so as to establish that copyright subsists in them as original literary works: *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 (CanLII), [2004] 1 SCR 339 [*CCH*]. Patterned Concrete notes that originality may be satisfied by the improvement of an existing work, such as bringing a dictionary or a road map up-to-date, or preparing a new edition of an existing work: *Canadian Standards Association v P.S. Knight Co. Ltd.*, 2016 FC 294 [*P.S. Knight*] at para 33, affirmed in *P.S. Knight (FCA)* at para 97.

[21] Patterned Concrete submits that the Contract, Quotation, and especially the Warranty are clearly not boilerplate. Rather, they are specific to Patterned Concrete's business, and reflect Mr. Padula's own language and work.

[22] The guiding principles regarding the originality that is required for copyright to subsist were established by the Supreme Court in *CCH*, and are not in dispute:

14 Section 5 of the *Copyright Act* states that, in Canada, copyright shall subsist "in every *original* literary, dramatic, musical and artistic work" (emphasis added). Although originality sets the boundaries of copyright law, it is not defined in the *Copyright Act*. Section 2 of the *Copyright Act* defines "every original literary ... work" as including "every original production in the literary ... domain, whatever may be the mode or form of its expression". Since copyright protects only the expression or form of ideas, "the originality requirement must apply to the expressive

element of the work and not the idea”: S. Handa, *Copyright Law in Canada* (2002), at p. 209.

15 There are competing views on the meaning of “original” in copyright law. Some courts have found that a work that originates from an author and is more than a mere copy of a work is sufficient to ground copyright. See, for example, *University of London Press v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601 (Eng. Ch. Div.); *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257 (Fed. T.D.). This approach is consistent with the “sweat of the brow” or “industriousness” standard of originality, which is premised on a natural rights or Lockean theory of “just desserts”, namely that an author deserves to have his or her efforts in producing a work rewarded. Other courts have required that a work must be creative to be “original” and thus protected by copyright. See, for example, *Feist Publications Inc. v. Rural Telephone Service Co.* (1991), 499 U.S. 340 (U.S. Kan.); *Tele-Direct (Publications) Inc. v. American Business Information Inc.* (1997), [1998] 2 F.C. 22 (Fed. C.A.). This approach is also consistent with a natural rights theory of property law; however it is less absolute in that only those works that are the product of creativity will be rewarded with copyright protection. It has been suggested that the “creativity” approach to originality helps ensure that copyright protection only extends to the expression of ideas as opposed to the underlying ideas or facts. See *Feist Publications Inc.*, *supra*, at p. 353.

16 I conclude that the correct position falls between these extremes. For a work to be “original” within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one’s knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean 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. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce “another” work would be too trivial to merit copyright protection as an “original” work.

[...]

25 For these reasons, I conclude that an “original” work under the *Copyright Act* is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author’s exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be “original” and covered by copyright, creativity is not required to make a work “original”.

[23] Mr. Padula stated that in 2008, Patterned Concrete was using a quotation form that had many blank spaces for setting out information, such as the scope of work and specifications for a project. He wanted to create a form that required less manual input of information into blank spaces, and that would be one page in length, uniform, clearly drafted, specific to Patterned Concrete’s products and processes, and visually appealing. He felt that checklists were important to avoid human error. After creating drafts and mock-ups, Mr. Padula created the Quotation form that, in his view, was visually appealing, and presented information in a one-page format that was specific to Patterned Concrete’s business, in clean fields, with concise checklists. Mr. Padula’s evidence describes a similar process to create the Contract. He testified that he felt the Quotation and Contract were different from the forms used by others in the industry.

[24] With respect to the Warranty, Mr. Padula testified that Patterned Concrete previously offered a one-year warranty, which was standard in the industry, and its terms consisted of a simple statement included within the terms and conditions printed on the back of the pre-2009 contract form. Mr. Padula stated that Patterned Concrete had experienced some problems with customers because the extent of its warranty coverage was unclear. He stated that he wanted to

create a new limited warranty with terms that would be detailed, clear, specific to Patterned Concrete's products and services, and visually distinctive. To distinguish Patterned Concrete's warranty from competitors' warranties and to improve customer satisfaction, Mr. Padula decided that the company would honour a five-year warranty. He states that he spent time determining what should be included in the warranty coverage and whether it would be financially sustainable to offer a five-year warranty. Mr. Padula decided against modifying the old warranty language included within the terms printed on the back of the contract, and chose to create a separate document in the form of a certificate. He stated that the Warranty he created in 2008/2009 as a result of this process was significantly different from anything used by competitors.

[25] Bomanite filed affidavits of two witnesses: Robert Fallone, president of Bomanite, and Vanessa Fallone, Human Resource Administrator. Mr. Fallone's affidavit primarily relates to Patterned Concrete's claim for damages, and Ms. Fallone's affidavit relates to the new, non-infringing Bomanite forms, which she prepared, and they are not particularly relevant to the first issue. The record also includes examples of Bomanite's forms that were in use before Patterned Concrete's previous employee, Mr. Schipani, became an estimator for Bomanite in 2015. Mr. Fallone was cross-examined about these forms. Bomanite's position is that the evidentiary record, including Mr. Padula's evidence and the examples of Bomanite's older forms, demonstrate the Works did not originate from Mr. Padula as the purported author, and they were not the product of a non-trivial exercise of skill and judgment.

[26] First, Bomanite argues that a negative inference should be drawn from Patterned Concrete's failure to file any physical or electronic copies of the draft forms or mock-ups that Mr. Padula made in the course of creating the Works, or Patterned Concrete's quotation and contract forms that were in use prior to 2009, and from which the Works were allegedly derived. Bomanite submits that Patterned Concrete provided no satisfactory explanation as to why it had not retained a single customer contract prior to 2009. Bomanite argues the Court may draw a negative inference from a party's failure to obtain material evidence, inability to remember details about material events, as well as the non-production of evidence in circumstances where it would be natural for such evidence to be produced, and it must be presumed that such evidence would "adversely affect the plaintiff's case": *Ma v Canada (Citizenship and Immigration)*, 2010 FC 509 at paras 3-4.

[27] On cross-examination, when Mr. Padula was asked to produce his drafts, mock-ups, and working lists used when he was creating the Works, he stated that he no longer had them because he did not think he needed to keep them. Mr. Padula had also drafted an "all-inclusive list of the information that [he] wanted to include in the quotation form" on paper and using his computer, but the list did not exist anymore; he testified that he did not think he would need this list 10 years later. Mr. Padula was asked to provide Patterned Concrete's previous forms, in use prior to 2009, and he answered that he could not because the company did not maintain its forms dating that far back. When asked about the retention policy, Mr. Padula stated he believed it was seven or eight years. He stated that it is not the company's practice to destroy documents after seven years, however, the company moved to a different building in 2009 and he believed Patterned Concrete would not have documents going that far back. Mr. Padula testified that both the pre-

2009 and the 2009 contract forms had been prepared on a computer but were no longer saved because his computer broke and he did not back up his hard drive. In my view, Mr. Padula reasonably explained why Patterned Concrete was unable to produce the early documents and I am not prepared to draw a negative inference.

[28] Second, Bomanite argues that since the pre-2009 contract and quotation forms were not in evidence, there is insufficient evidence to determine what Mr. Padula actually drafted in 2009, as compared to what existed before. Bomanite argues that Mr. Padula's cross-examination revealed Mr. Padula's brother drafted Patterned Concrete's initial forms in 1990. While the brother is another co-owner of Patterned Concrete, Bomanite argues that it is important to distinguish his contributions from those of Mr. Padula because Patterned Concrete provided no evidence to support the originality of the brother's work. Thus, Bomanite argues that it is impossible to establish the specific parts of the Works that allegedly resulted from the exercise of Mr. Padula's skill and judgment, and whether those parts were copied. Bomanite also relies on Mr. Padula's evidence that:

- a. the original terms and conditions of the Contract were drafted in 1990 (Patterned Concrete has been in business since 1990), likely by Mr. Padula's brother;
- b. Patterned Concrete's quotation and contract forms have always been one-page forms;
- c. Mr. Padula looked at competitors' forms when he created the Works, but he is unable to recall which competitors' forms he may have referred to specifically;
- d. Mr. Padula consulted with Patterned Concrete's estimators to assess what "forms used by others" looked like; and
- e. Mr. Padula could not identify which parts of the terms and conditions were part of the revisions he claims to have made in 2009, rather than the pre-existing work of others including his brother.

[29] I am not persuaded by Bomanite's submissions on this point. Mr. Padula testified that Patterned Concrete has been operating since 1990, and he joined the company in 1991. Mr.

Padula testified that Patterned Concrete's forms evolved incrementally each year. He authored not only the 2009 revisions, but also the forms that Patterned Concrete had been using at that time—he stated that he personally created these forms in the course of his employment. While Mr. Padula stated his brother made the first draft in 1990, in 2009 there was a “big clean up” revision by Mr. Padula, resulting in the Works that are at issue in this proceeding. The Warranty was first created as a separate certificate in 2009. Mr. Padula stated that in 2009 the forms were “really tweaked [...] to the point where, you know, we felt very happy with it, and I put together something nice that we have used since”. With respect to Mr. Padula's evidence that his brother drafted the original set of terms and conditions for Patterned Concrete's contract in 1990, noted as points (a) and (e) above, that evidence relates to the brother's work on contractual terms and conditions found on the back of Patterned Concrete's Contract form. Patterned Concrete does not allege that the terms and conditions were copied, and they are not relevant to the allegations of infringement.

[30] In conclusion, while Mr. Padula likely did not draft the full content of previous versions of the Quotation and Contract forms from the beginning, I am not satisfied that significant aspects of the Quotation, Contract, and Warranty were not his work. I find that Mr. Padula's evidence establishes that he is the author of the Works.

[31] Third, Bomanite argues that the Works simply reflect standard terms and conditions in the industry, and that they are reorganized iterations of the same one-page contract, quotation, and warranty forms widely used in the stamped concrete industry. Mr. Padula testified that he had seen competitors' forms in the past and that he was aware of what they looked like; however,

he stated he did not have the competitors' forms beside him while he drafted Patterned Concrete's revised forms. In my view, Bomanite has not established that the Works are reorganized iterations of the same one-page contract and quotation forms or warranty certificates that are widely used in the stamped concrete industry. Indeed, Bomanite only tendered examples of its own previous contracts to demonstrate what one-page contract forms in the industry may have looked like, and these are notably different from the Contract form created by Mr. Padula. For example, Patterned Concrete's Contract form contemplates specific details about the project in the form of checkboxes such as architectural finish, specifications, and "additional to contract" items, providing a customer-friendly visual of the contractual terms that is different from Bomanite's earlier forms.

[32] Fourth, Bomanite submits that Mr. Padula's testimony demonstrates he took existing contracts from Patterned Concrete, compared them to competitors' contracts, and engaged in an iterative editing process to arrive at the Works. Bomanite argues that the skill and judgment involved in reorganizing standard information on a one-page form is similar to "simply changing the font of a work" and is too trivial to merit copyright protection as an original work, according to *CCH* (at para 16). Also, Bomanite submits there is an important distinction between skill and judgment expended to create works, and skill and judgment expended in the ordinary course of employment. Bomanite states that the "considerable number of weeks" spent preparing the Warranty was actually time that Mr. Padula spent substantively determining the type of warranty that Patterned Concrete could offer its clients, rather than working on the expression of the Warranty certificate itself. Bomanite cautions that if the Works in question are found to be

original within the meaning of the *Copyright Act*, this would suggest that any work produced by an employee of a company as a corollary of his employment will attract copyright protection.

[33] In my view, Mr. Padula's efforts were not trivial, and did not amount to no more than a mere mechanical exercise or a mere copying of another work. Based on Mr. Padula's evidence, which sets out the steps he undertook to create the Works, I am satisfied that the Works originated from Mr. Padula and that he exercised sufficient skill and judgment for copyright to subsist. The evidence establishes that the expression in the Works resulted from an exercise of Mr. Padula's skill (use of his knowledge, developed aptitude or practised ability) and judgment (use of his capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work) sufficient to satisfy the originality requirement: *CCH* at para 16.

[34] I find that Patterned Concrete owns the copyright subsisting in the Works. Mr. Padula's evidence that he created the Works in the course of his employment with Patterned Concrete was not contested, and by operation of section 13(3) of the *Copyright Act*, Patterned Concrete is deemed to be the first owner of the copyright subsisting in the Works.

[35] In addition, the certificates of registration, which are consistent with Mr. Padula's evidence, provide some evidence that copyright subsists in the Works and that Patterned Concrete owns the copyright: *Copyright Act*, section 53.

[36] There is no genuine issue for trial regarding *Issue 1: Does copyright subsist in the Works, and is it owned by Patterned Concrete?* Patterned Concrete has established that copyright subsists in the Works, and that it is the owner. My conclusions are consistent with the presumptions of copyright subsistence and ownership under section 34.1 of the *Copyright Act*, although I would have reached the same conclusions even in the absence of the presumptions, based on the evidence before the Court.

B. *Issue 2: Has Bomanite infringed copyright in the Works?*

[37] Patterned Concrete submits that a court may infer copyright infringement if the plaintiff proves: (a) there is substantial similarity such that the allegedly infringing work could be considered a copy or reproduction of the protected work; and (b) the defendant had access to the protected work, which is sometimes referred to as a “causal connection”: *Philip Morris Products S.A. v Marlboro Canada Limited*, 2010 FC 1099 at para 315 [*Philip Morris*] (reversed in part in *Marlboro Canada Limited v Philip Morris Products S.A.*, 2012 FCA 201 [*Marlboro*], but not on the copyright infringement issue). Whether Bomanite has infringed copyright by taking a substantial part of a protected work is essentially a question of fact: *Marlboro* at para 118.

[38] Patterned Concrete presented evidence that Mr. Schipani, a long-time employee of Patterned Concrete, resigned in March 2015 to accept a position as an estimator with Bomanite. On April 9, 2015, Patterned Concrete’s lawyers wrote to Mr. Schipani, reminding him of his post-employment obligations regarding Patterned Concrete’s confidential information and customers.

[39] Some time later, in the fall of 2016, Mr. Padula learned that Bomanite was offering a six-year warranty to its customers. Mr. Padula later obtained copies of Bomanite's contract and limited warranty forms in 2017. Based on his review, Mr. Padula believed that Bomanite's forms had been copied from the Works, and on June 14, 2017, Patterned Concrete's lawyers sent a demand letter to Mr. Schipani and to Bomanite. The demand letter alleged that Bomanite's quotation, contract, and warranty were "slavish copies" of Patterned Concrete's Works.

[40] Patterned Concrete submits that the material facts establishing infringement of Patterned Concrete's copyright by Bomanite are clear and not disputable. In addition to the evidence consisting of copies of the Works and the allegedly infringing Bomanite forms, Mr. Padula oversaw the preparation of three tables that compare passages from Bomanite's forms to each of the Works. These tables were provided to Bomanite, and they are attached as exhibits to Mr. Padula's affidavit on this motion.

[41] Mr. Padula testified that he believes that the allegedly infringing Bomanite forms had been in use since 2015.

[42] Bomanite submits Patterned Concrete has led no evidence to establish direct proof of copying, and insufficient evidence to establish a *prima facie* case of infringement on the basis of sufficient similarity between the Works at issue and Bomanite's forms. Even if a *prima facie* case of copying is established, Bomanite submits that there can be no infringement where a defendant shows that the allegedly infringing work results from a common source, or an independent creation, and Bomanite submits it provided evidence of its own iterative editing

process by introducing samples of Bomanite's previously-used forms: *Pyrrha Design Inc. v Plum and Posey Inc.*, 2019 FC 129 at paras 121-122 [*Pyrrha Design*], citing *Philip Morris* at paras 315 and 320.

[43] Also, Bomanite submits that this Court has long recognized that “the simpler the copyrighted work, the greater the need to establish exact copying in order to establish infringement”: *Pyrrha Design* at para 123; *DRG Inc. v Datafile Ltd.*, 1987 CarswellNat 765, [1988] 2 FC 243 at para 21. Although Mr. Padula admitted that the Patterned Concrete forms changed “from time to time over the course of years,” Patterned Concrete did not tender any of its earlier (pre-2009) forms into evidence, and none were provided in response to requests for such documents on cross-examination. Bomanite argues that it and Patterned Concrete have historically used one-page forms, and both companies have periodically revised and reformatted their forms over the years. It asserts that much of the language at issue is directly traceable to earlier versions of Bomanite's contract, quotation, and warranty forms (which existed prior to Mr. Padula's alleged authorship of the Works in 2008/2009), and that Patterned Concrete has failed to show copying. Bomanite also relies on evidence that both Patterned Concrete's Works and the Bomanite forms are the products of years of revisions and reformatting, which it asserts were based on common industry terms and language.

[44] In my view, a side-by-side comparison of the two sets of forms demonstrates substantial similarity between Bomanite's forms and the Works, in content and in the format. When I consider the progression of changes made to the Bomanite contract forms over the years, the changes seen between pre-2017 versions of the Bomanite contract and the 2017 version that was

allegedly copied are significant. I disagree with Bomanite that much of the common language is directly traceable to earlier versions of Bomanite's forms. Many phrases that appear in the Contract newly appear in the Bomanite 2017 contract form, including a section for "Architectural Finish", additional checkboxes in the "Contract to Include" section, the wording "Special to Contract", and added options in the borders section such as the wording "As per Design – 1 Pour". A section titled "Additional to Contract" and the majority of the phrases that appear in this section are also new to Bomanite's 2017 contract.

[45] While Bomanite's forms have changed "from time to time over the course of years", the changes to Bomanite's 2017 contract form and the wording of Bomanite's warranty certificate bear striking similarities to the Works. I find the similarities are more consistent with copying than with being the product of Bomanite's iterative editing of its prior forms. It is noteworthy that a copy of a Bomanite form, titled as a contract and used in 2011, closely resembles Patterned Concrete's Quotation form that was published in 2009. Bomanite used the 2011 contract form as a quotation form until 2017. While the 2011 form pre-dates Mr. Schipani's resignation from Patterned Concrete, Bomanite did not introduce any evidence about who created its 2011 form, or how it was created. Indeed, Bomanite introduced no evidence to prove who authored any of its forms in use over the years. During cross-examination, Mr. Fallon testified that he did not know who authored Bomanite's 6-year warranty certificate or the Bomanite contract form that was allegedly copied. Mr. Fallon also testified that he did not know when Bomanite began to use the warranty or contract forms in issue. When asked who was responsible for introducing the forms at issue, Mr. Fallon guessed that two or three salesmen "took it upon themselves to rewrite their quotation sheet, and get it printed off".

[46] With regard to the warranty certificate, Mr. Fallone testified that Bomanite began offering a six-year warranty after seeing “a small company in the Woodbridge area that started with a six-year or a five-year warranty on some advertisement [Bomanite] saw” and that it had nothing to do with Patterned Concrete; however, in oral argument, Bomanite did not seriously contest that its warranty certificate bears substantial similarity to Patterned Concrete’s Warranty certificate.

[47] In my view, Bomanite has failed to establish that the elements of similarity were due to a commonality of terms rather than copied from Patterned Concrete’s forms, or independently created.

[48] Also, I find that Bomanite had access to the Works. Mr. Schipani, who worked at Patterned Concrete as an estimator for over 20 years, began working at Bomanite in 2015. I find Mr. Schipani would have been familiar with the Works and would have had access to them from his employment at Patterned Concrete. Furthermore, the similarity between Bomanite’s allegedly infringing forms and the Works is sufficient to infer such access, particularly since the evidence suggests that it is not overly difficult to obtain copies of competitors’ forms. Mr. Padula testified that customers could provide copies to competitors. Therefore, even if Mr. Schipani did not provide the copies, in my view there is sufficient evidence to establish that Bomanite had access to the Works.

[49] I find there is no genuine issue for trial regarding *Issue 2: Has Bomanite infringed copyright in the Works?* Patterned Concrete has established that Bomanite had access to the

Works, and the substantial similarity between the Works and Bomanite's forms is sufficient to infer copying. The evidence is inconsistent with the similarities arising from a commonality of terms in the industry, or an independent creation.

C. *Issue 3: Is Patterned Concrete entitled to an injunction and statutory damages?*

[50] Patterned Concrete argues that injunctions in favour of a successful plaintiff tend to be granted as a matter of course in intellectual property cases before this Court. Bomanite argues that no injunction should be awarded, as it is unnecessary: Bomanite has already changed its forms, and Patterned Concrete confirms they are not infringing. I am not persuaded that an injunction is unnecessary because Bomanite changed its forms in early 2018. Mr. Fallone's evidence on cross-examination suggests that Bomanite did not have a mechanism in place for supervising changes to Bomanite's forms, and changes over the years appear to have been made without Mr. Fallone's knowledge. In my view, an injunction prohibiting the reproduction of all or a substantial part of the Works is appropriate in this case.

[51] In the alternative, Bomanite submits Patterned Concrete should not be awarded any remedy other than an injunction because Bomanite was not aware and had no reasonable grounds to suspect that copyright subsisted in the Works: s. 39(1) of the *Copyright Act*. Mr. Fallone, president of Bomanite, stated during cross-examination that he did not know of anyone copying Patterned Concrete's forms. In my view, Bomanite's evidence falls short of establishing Bomanite's lack of awareness that copyright subsisted in the Works. Bomanite did not adduce evidence from the person responsible for drafting the infringing Bomanite forms—whether that person was Mr. Schipani or someone else. Bomanite argues that it was open to Patterned

Concrete to summon Mr. Schipani as a witness, since he was a “freelance” estimator and not an employee of Bomanite. However, the legal nature of Mr. Schipani’s relationship with Bomanite is unclear. On cross-examination, in answer to a question about the nature of Mr. Schipani’s duties as an employee of Bomanite, Mr. Fallon responded that he was “sort of a freelance salesperson”, but twice in his affidavit sworn in response to this motion for summary judgment, Mr. Fallon clearly refers to Mr. Schipani as an employee. In any event, Bomanite bears the onus of establishing that it is entitled to the benefit of the statutory exception in section 39(1) and it has not met its onus. Mr. Fallon’s evidence during cross-examination was that he did not know of anyone copying Patterned Concrete’s forms, but he made no efforts to find out, including by asking Mr. Schipani. Mr. Fallon could not say whether anyone else in his organization had knowledge of copying. Finally, Bomanite did not establish that there were no further infringements after Patterned Concrete put it on notice of the allegations of copyright infringement by delivering a demand letter in June of 2017.

[52] The monetary relief claimed in Patterned Concrete’s statement of claim included damages for infringement of copyright in the sum of \$100,000 or alternatively “an award of statutory damages in a sum of not less than \$500.00 and not more than \$20,000.00 that this Court considers just, with respect to all infringements of copyright claimed in this action for each of the Literary Works.” About one month before the hearing of this motion, Patterned Concrete sent a letter notifying Bomanite of its election to recover statutory damages pursuant to section 38.1 of the *Copyright Act*.

[53] Section 38.1(1)(a) of the *Copyright Act* provides:

**Statutory damages**

**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

[...]

**Dommages-intérêts préétablis**

**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 oeuvre 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;

[...]

[54] Section 38.1(1)(a) is subject to a number of express statutory considerations set out in sections 38.1(1)(b) to 38.1(7). The sections relevant to this proceeding will be discussed below.

[55] The parties generally agree on the overarching principles applicable to the Court's determination of an appropriate award of statutory damages. Patterned Concrete submits that the

overarching mandate is to arrive at a reasonable assessment that considers the statutory provisions and all of the circumstances of the case, to yield a just result: *Telewizja Polsat S.A. v Radiopol Inc.*, 2006 FC 584 [*Telewizja Polsat*]; *Collett v Northland Art Company Canada Inc.*, 2018 FC 269 [*Collett*]. Bomanite submits that the Court's discretionary authority is rooted in principles of fairness and proportionality between the quantum of statutory damages awarded and the egregiousness of the infringement. Pursuant to s. 38.1(5) of the *Copyright Act*, Bomanite submits the Court should consider all relevant factors in exercising such discretion, including the good faith or bad faith of the parties and their conduct before and during these proceedings: *Telewizja Polsat* at para 31.

[56] Patterned Concrete interprets section 38.1 as providing authority to award statutory damages in the amount calculated by multiplying a dollar amount that falls within the \$500 to \$20,000 statutory damages range by the number of infringing copies of the Works, on the basis that each unauthorized copy of a work constitutes an act of infringement. Patterned Concrete asks for a total award of \$584,000, the product of multiplying \$500 (the low end of the range) and 1,168, which is Mr. Padula's "conservative" estimate of the number of infringing reproductions of the Works that Bomanite has made.

[57] Patterned Concrete argues that it is illogical to interpret section 38.1 in a way that limits statutory damages to an amount calculated by multiplying a dollar amount falling within the range by the number of works at issue, because it would mean that an award of statutory damages is no different from nominal damages, which have always been available in copyright infringement proceedings. Patterned Concrete was unable to point to case law supporting its

interpretation of section 38.1. While it could not point to a case regarding statutory damages specifically, Patterned Concrete relies on a “majority of cases” holding that each act of infringement stands on its own as a separate cause of action.

[58] In the alternative to an award of statutory damages based on the number of reproductions, Patterned Concrete asks for an award of \$20,000 per work, or \$60,000.

[59] Bomanite states that it has been taken by surprise regarding Patterned Concrete’s position on the interpretation of section 38.1. While Patterned Concrete gave notice of its election to seek statutory damages, Bomanite was unaware it was seeking statutory damages of \$584,000 based on a per copy calculation until Patterned Concrete made its submissions on damages at the hearing. Bomanite points out that the amount sought is close to six times the claim for compensatory damages pleaded in the statement of claim.

[60] Bomanite argues that Patterned Concrete’s interpretation of section 38.1 ignores the plain language of that section, which sets a monetary range that clearly relates to all infringements involved in the proceedings for each work. Bomanite submits the case law is consistent with its interpretation, referring to *Telewizja Polsat* and *Rallysport Direct LLC v 2424508 Ontario Ltd.*, 2020 FC 794 as examples of cases where this Court has awarded statutory damages based on multiplying a number within the monetary range by the number of works, and not by the number of reproductions, the number of visits to a website, or the like.

[61] I agree with Bomanite that section 38.1(1)(a) uses different words—all infringements involved in the proceedings, each work—and on a plain reading provides a remedy of statutory damages that is calculated by multiplying a dollar amount within the monetary range by the number of works, not the number of infringements. In my view, case law establishing that each infringement stands as a cause of action does not compel a different interpretation. As noted above, Patterned Concrete did not point to any case where a court has calculated statutory damages by multiplying a number within the monetary range of section 38.1 by the number of infringements, and I was unable to find such a case. The “per work” nature of statutory damages was recently confirmed by Justice Kane in *Young v Thakur*, 2019 FC 835 [*Thakur*] at paragraphs 40-41:

[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”.

[62] Accordingly, in this case the range of statutory damages available under section 38.1 based on three works would be \$1,500 to \$60,000, subject to the statutory exceptions.

[63] Bomanite submits that the exceptions under sections 38.1(2) and (3) apply to reduce statutory damages.

[64] Section 38.1(2) of the *Copyright Act* grants discretion to reduce an award of statutory damages to an amount between \$200 and \$500 where a defendant satisfies the court that it was not aware and had no reasonable grounds to believe that it had infringed copyright. For the same reasons discussed in relation to section 39(1) of the *Copyright Act*, I am not satisfied that statutory damages should be reduced pursuant to section 38.1(2).

[65] Section 38.1(3) grants the discretion to award, with respect to each work, a lower amount than \$500 or \$200 per work where there is more than one work in a single medium and the awarding of the minimum under section 38.1(1) would result in a total award that is grossly out of proportion to the infringement. Relying on *Trader v CarGurus*, 2017 ONSC 1841 at paragraph 57 [*Trader*], Bomanite asserts that photocopies of the forms at issue in the present case were made within a single medium. I am not satisfied that I should award an amount lower than \$500 per work. First, I disagree with Bomanite's interpretation of the *Trader* case. It is the works, not the copies, that must be in a single medium in order for section 38.1(3) to apply. Second, I am not satisfied that a minimum award under section 38.1(1) of \$1,500 for the three Works at issue would be grossly out of proportion to the infringement in this case.

[66] If a plaintiff elects statutory damages under section 38.1 of the *Copyright Act*, the Court may consider all relevant factors. Section 38.1(5) of the *Copyright Act* reads as follows:

**Factors to consider**

(5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including

**Facteurs**

(5) Lorsqu'il rend une décision relativement aux paragraphes (1) à (4), le tribunal tient compte notamment des facteurs suivants :

<b>(a)</b> the good faith or bad faith of the defendant;	<b>a)</b> la bonne ou mauvaise foi du défendeur;
<b>(b)</b> the conduct of the parties before and during the proceedings;	<b>b)</b> le comportement des parties avant l'instance et au cours de celle-ci;
<b>(c)</b> the need to deter other infringements of the copyright in question; and	<b>c)</b> la nécessité de créer un effet dissuasif à l'égard de violations éventuelles du droit d'auteur en question;
<b>(d)</b> 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.	<b>d)</b> dans le cas d'une violation qui est commise à des fins non commerciales, a 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 on et de son effet sur le demandeur.

[67] Patterned Concrete submits that an award of statutory damages should reflect Bomanite's uncooperative behaviour. It submits that Bomanite did not promptly cease using its forms after receiving Patterned Concrete's demand letter, did not inform Patterned Concrete that the forms had been changed until it delivered a defence, did not provide copies of the revised forms until Patterned Concrete subsequently requested them, and refused to provide information regarding the extent of use of the forms. However, I agree with Bomanite that it is a mischaracterization to state that Bomanite acted in bad faith or that it was uncooperative. Although Bomanite did not agree with Patterned Concrete's position, there were regular communications between counsel for the parties and efforts to resolve the matter. Within about nine months, Bomanite had voluntarily changed its forms. Furthermore, Bomanite's refusal to provide information regarding

the extent of use of the forms was the subject of a motion, and Bomanite provided the documents and information ordered to be produced. That said, Bomanite's conduct was not entirely in good faith, either. Perhaps it was posturing, but Bomanite refused to give any form of undertaking, did not offer to present its revised forms to Patterned Concrete, and did not actually provide the forms to Patterned Concrete until litigation proceedings had been commenced. In my view, the good faith or bad faith of Bomanite is a neutral factor that is not particularly relevant to increase or decrease what I would consider a just award in the circumstances of this case.

[68] Bomanite submits Patterned Concrete has failed to lead any evidence that would support the finding that it incurred damages, let alone the quantum of damage, and the lack of actual damages is relevant to an assessment of statutory damages. It argues Patterned Concrete has failed to lead any evidence that the use of the Works provided Bomanite with a competitive advantage in the marketplace as alleged in the statement of claim, or that the Quotation, Contract, and Warranty forms were determinative factors for customer procurement, retention, or loss for Bomanite or Patterned Concrete.

[69] Patterned Concrete counters that a competitive advantage can be inferred, and Bomanite has not established that it enjoyed no competitive advantage. According to Patterned Concrete, it was apparent that Bomanite's witness, Mr. Fallone, was more involved in the municipal side of Bomanite's business and not particularly involved in the residential side, which competes with Patterned Concrete. Bomanite did not lead any evidence from its estimators who actually bid on this type of residential work or on why Bomanite would decide to change its forms if there was no advantage. Furthermore, Patterned Concrete submits that statutory damages recognize that

actual damages are often difficult to prove, and the effect of a plaintiff's actual damages on the determination of statutory damages is an issue that has not been conclusively decided. Earlier cases indicated some correlation between the two (for example, *Telewizja Polsat*, above), but Patterned Concrete submits that recent cases have simply observed that statutory damages require a reasonable assessment based on all of the circumstances in order to reach a just result: *Thakur* at paras 54-60; *Thomson v Afterlife Network Inc.*, 2019 FC 54 at paras 62-64; *Collett*, above, at para 59.

[70] In my view, statutory damages under section 38.1 are awarded “instead of damages and profits referred to in subsection 35(1).” As a separate head of damages, determining the amount of statutory damages that the Court considers just is not necessarily tied to a plaintiff's actual damages or a defendant's actual profits. Factors that I consider relevant in arriving at an appropriate quantum of the statutory damages award in this case include:

- a. Mr. Padula's evidence that the reason he changed Patterned Concrete's forms was to offer a better customer experience, in order to weather the economic downturn in 2008 and attract new business;
- b. the absence of evidence explaining why Bomanite changed its forms;
- c. Mr. Padula's evidence of the efforts he undertook to change Patterned Concrete's forms, based on his considerable experience in the industry—however, I am also mindful that Patterned Concrete made no attempt to quantify the value of those efforts;
- d. Mr. Fallone's evidence that he estimated the value of Vanessa Fallone's work in revising the Bomanite quotation, contract, and warranty forms to be about \$2,500;
- e. Ms. Vanessa Fallone's evidence that she is the Human Resources Administrator for Bomanite, and she prepared Bomanite's new quotation, contract, and warranty forms based on earlier versions of the forms the company had used in the past, and discussions with sales representatives;
- f. the Works themselves are not sold for value;

- g. the parties use their forms for a commercial purpose;
- h. the infringing forms were used for about three years by Bomanite; as this included one year after Patterned Concrete sent its demand letter, Bomanite's response was neither immediate nor egregiously lengthy;
- i. while the parties disagree about whether they are competitors, I agree with Patterned Concrete that they are competitors;
- j. the need to deter other infringements of the copyright in question; and
- k. as noted above, while Bomanite did not act in bad faith so as to warrant an increase in statutory damages, neither does its conduct warrant a reduction on account of good faith.

[71] I consider an award of \$8,000 per work, for a total statutory damages award of \$24,000, to be a just result and a reasonable assessment in view of all of the circumstances of the case.

[72] Patterned Concrete also requested punitive or exemplary damages in the amount of \$40,000. I agree with Bomanite that there is no legal basis for awarding punitive damages against it. Patterned Concrete led no evidence that Bomanite engaged in "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour" such that it would warrant punitive damages: *Whiten v Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 SCR 595 at para 36. Punitive damages are warranted only where the defendant's conduct in infringing copyright is outrageous, highly unreasonable, or otherwise demonstrates a callous disregard for the rights of the plaintiff: *Adobe Systems Incorporated v Dale Thompson DBA Appletree Solutions*, 2012 FC 1219 at para 11. Bomanite voluntarily revised the forms at issue within a reasonable time. Deterrence is already factored into an award of statutory damages, and there is no evidence of conduct that would merit an award of punitive damages against Bomanite.

IV. **Conclusion**

[73] Summary judgment is appropriate in this proceeding, and Patterned Concrete's motion is granted. Patterned Concrete has established that it owns copyright in the Works, and copyright subsists in the Works. Bomanite has infringed copyright by making substantial reproductions or copies of the Works, contrary to the provisions of the *Copyright Act*.

[74] Patterned Concrete is entitled to an injunction restraining Bomanite, its directors, officers, employees, agents, and all those over whom it exercises control from making substantial reproductions or copies in material form of the Works or authorizing the making of such reproductions or copies contrary to the provisions of the *Copyright Act*. Bomanite shall deliver up under oath or destroy under oath all material that would offend the injunction, in Bomanite's possession or in the possession of its directors, officers, employees, or agents and all those over whom it exercises control. The injunction and order for delivery up or destruction will be subject to necessary exceptions, including for copies of Bomanite's completed contracts and forms required to be retained for business purposes, and the Court will provide a draft judgment to the parties for review of the specific terms.

[75] I award statutory damages in the amount of \$24,000. Patterned Concrete has failed to establish that it is entitled to punitive or exemplary damages and such damages are denied.

[76] During the hearing, the parties asked to deliver written cost submissions after my decision. The parties are also asked to provide submissions on prejudgment and post-judgment

interest. Patterned Concrete shall deliver its written submissions within 15 days of this decision, and Bomanite shall deliver its responding written submissions within 15 days of receiving Patterned Concrete's submissions. Each party's submissions shall be 10 pages or less, not including any draft bill of costs or list of authorities.

[77] The final terms of judgment will be delivered as part of the Court's supplementary reasons on costs and interest.

**JUDGMENT in T-1845-17**

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

1. The motion for summary judgment is granted, with final terms of judgment to be delivered;
2. Any awards of costs and interest remain to be determined;
3. The parties shall deliver written submissions on costs and interest in accordance with this Court's reasons.

"Christine M. Pallotta"

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Judge

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

**DOCKET:** T-1845-17

**STYLE OF CAUSE:** PATTERNED CONCRETE MISSISSAUGA INC. v  
BOMANITE TORONTO LTD.

**PLACE OF HEARING:** TORONTO, ONTARIO BY WAY OF  
VIDEOCONFERENCE

**DATE OF HEARING:** NOVEMBER 12, 2020

**JUDGMENT AND REASONS:** PALLOTTA J.

**DATED:** APRIL 12, 2021

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