



Civil Resolution Tribunal

Date Issued: May 22, 2018

File: SC-2017-005005

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Whitehall Entertainment Incorporated v. Kaffka*, 2018 BCCRT 196

B E T W E E N :

Whitehall Entertainment Incorporated

APPLICANT

A N D :

Alicia Kaffka

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. The applicant Whitehall Entertainment Incorporated says the respondent Alicia Kaffka¹ has refused to return items relating to the applicant's independent short film project titled "Hey, That's My Bike!" (film). The applicant's principal, Brenda Whitehall, wrote the film with her sister. Ms. Whitehall was the film's executive producer, and the applicant financed the film and has the registered copyright to it. As such, the applicant says that it alone owns the film, including the external hard drives that contain the film footage, as well as props and wardrobe the applicant purchased for the film.
2. By early April 2017, the applicant retained Ms. Kaffka on a volunteer basis to direct and co-produce the film, which is undisputed. The applicant says it terminated Ms. Kaffka's involvement on June 16, 2017.
3. The respondent submits that she became a co-executive producer and "co-owner" of the film, and the creative vision behind the finished project. She says it was therefore not in Ms. Whitehall's power to "fire" her. Ms. Kaffka asserts ongoing rights to the film, including its promotion on her own social media sites.
4. For the reasons that follow, I agree with the applicant that it is the film's sole owner. I have addressed the applicant's requested remedies below. In this dispute, Ms. Kaffka is self-represented and the applicant is represented by Ms. Whitehall.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and

¹ I have used the spelling "Kaffka", although I note the respondent has also spelled her last name "Kafka" at times.

recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing. An oral hearing was not requested.
7. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
8. Under tribunal rule 126, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.
9. I pause to note the respondent references out-of-pocket expenses she incurred for the film. There is evidence that all of the film's expenses have been paid, although I make no decision about it. I say this because there is no counterclaim before me in this dispute, and therefore I will not comment further on whether Ms. Kaffka is entitled to reimbursement for outstanding expenses, if any.

ISSUES

10. The issues in this dispute are:
 - a. Who owns the film?
 - b. Has the respondent improperly refused to return to the applicant properties relating to the film, such as the external hard drives containing film footage, wardrobe, and props?

- c. To what extent, if any, is the applicant entitled to reimbursement of \$5,000, being half the film's production costs?
- d. Should the respondent be ordered to remove all social media posts relating to the film, on the basis it is copyright infringement?

EVIDENCE AND ANALYSIS

11. I have only commented on the evidence and submissions to the extent necessary to give context to these reasons. In a civil dispute such as this, the applicant bears the burden of proof on a balance of probabilities.

Background

12. Ms. Kaffka says Ms. Whitehall had poorly developed her film project and did not contribute her fair share to it, and that in the end she and her husband completed all tasks by themselves. While the evidence before me does not support this conclusion, for reasons discussed below nothing turns on it. What matters is who owns the film.
13. It is undisputed that the film idea originated with the applicant, not the respondent. I also find the evidence is clear that at the outset the parties agreed the applicant owned the film and that Ms. Whitehall was the person giving instructions.
14. It is also undisputed that the parties' expectation at the outset was that the applicant would finance the film's production. I find that she did so, although I acknowledge that the respondent may have later contributed financially, with or without the applicant's prior approval. However, Ms. Kaffka's financial contribution in terms of paying certain expenses along the way does not make her the film's owner.
15. The parties emailed frequently in April and May 2017, and I find they were amicable and collaborative. Things changed just before the May 27 and 28, 2017 film shoot. I find that Ms. Kaffka became frustrated with Ms. Whitehall's approach

and what she perceived to be inappropriate responses. As discussed further below, it was on May 25, 2017 that Ms. Kaffka first demanded that she be given a co-executive producer credit. I have found below that any such credit, even if given, did not transfer any ownership of the film to Ms. Kaffka.

Copyright Act

16. It is undisputed that Ms. Whitehall and her sister have the registered copyright for the dramatic title “Hey, That’s My Bike!”, based on a January 3, 2017 Certificate of Registration of Copyright. I find this is the copyright for the film, as discussed below.
17. On the copyright registration for the film, it is identified as “dramatic”. Under the federal *Copyright Act*, a “dramatic work” includes any cinematographic work, which includes the film. That statute defines “maker”, in relation to a cinematographic work, as the person who makes the arrangements for the project, including arrangements for entering into contracts with performers and financial arrangements. I find the film’s maker is the applicant, and not the respondent.
18. The applicant is the named insured on the multiple insurance documents for the May 27 to 28, 2017 film shoot. I make the same finding about the City of Vancouver’s film activity permit. The applicant is named as “the Producer” on its May 19, 2017 agreement with the Union of BC Performers, titled “20/20 Ultra Low Budget Agreement”. There is no reference to Ms. Kaffka on these documents, save for being called a location manager on the film activity permit. I find these documents support the conclusion that the applicant was solely responsible for the film’s legal and financial obligations and that the applicant is the film’s sole owner.
19. Section 13(3) of the *Copyright Act* states that when works are made in the course of employment, the employer is the first owner of the copyright – unless there is an agreement to the contrary. Ms. Kaffka’s creative contributions to the film were part of her volunteer work for the applicant. Those contributions do not make Ms. Kaffka an owner.

20. Contrary to the respondent's submission, as referenced above the copyright to the screenplay extends to the finished film project, as per section 3(d) of the *Copyright Act*. Section 13 of the *Copyright Act* states that the work's author is the first owner of the copyright. Section 13(4) says that no assignment or grant of copyright is valid unless the work's owner has signed it in writing. There is no such written assignment or grant before me, and I find the applicant and Ms. Whitehall never gave Ms. Kaffka copyright or any ownership of the film. Further, the respondent does not have any "moral rights" to the film, within the meaning of the *Copyright Act*.
21. Under section 3 of the *Copyright Act*, copyright for the film means the sole right to produce or reproduce the work or any substantial part of it, in any form. I find this includes the right to reproduce or post it on social media.
22. Section 27 of the *Copyright Act* states it is an infringement of copyright for any person to do anything that the statute says only the work's owner can do. This includes distributing or exposing or exhibiting the work, here the film, to such an extent as to prejudice the film's owner. I find Ms. Kaffka's promotion of the film on social media was a violation of the applicant's copyright.

Co-executive producer credit

23. At the heart of this dispute is who owns the completed film and its related work product. Was the respondent a co-executive producer of the film? If so, does that make her a co-owner? I find the answer is no.
24. I agree with the applicant that intellectual property, including the idea for the film, is owned by the person who created it originally or the person who bought it or received it as a gift. This is the meaning of copyright. As referenced above, the fact that Ms. Kaffka contributed to the film creatively or even financially does not make her the film's owner. The applicant owns the copyright to the film.
25. In a May 25, 2017 email to Ms. Whitehall, Ms. Kaffka threatened to shut the film down if Ms. Whitehall did not call her and later that day, Ms. Kaffka emailed Ms.

Whitehall asking for a co-executive producer credit, on the basis she had spent more money on the film than Ms. Whitehall had. Ms. Kaffka wrote “if you agree to this, then we will move forward with filming”. Ms. Whitehall responded simply “Agreed”, which I accept she did only because she did not want to jeopardize the May 27 and 28, 2017 film shoot.

26. In any event, I find at most Ms. Whitehall agreed to the co-executive producer credit, and not any transfer of the film’s ownership, which Ms. Kaffka did not request in her email. Ms. Whitehall’s agreement to the credit was not apparently freely given since Ms. Kaffka was threatening to shut the film shoot down, but I do not need to determine that issue here. In any event, the *Copyright Act’s* requirements for a signed written assignment of copyright were not met.
27. I find that Ms. Kaffka decided that she needed to take over the film and ensure its proper completion. I find that she had no authority to do so, as she was not the film’s owner. This is relevant background to the proper role Ms. Kaffka played with the film.
28. On June 5, 2017, Ms. Whitehall emailed the respondent to say that she was willing to give her a co-executive producer credit on the condition that it was for credit purposes only and that it did not give her any rights to the film.
29. On June 8, 2017, Ms. Kaffka replied stating, among other things, that she would not agree to receive “previously agreed to credits after the fact”.
30. As noted above, on June 16, 2017, through a letter from her lawyer, the applicant terminated the respondent’s ongoing involvement with the film.
31. In her June 16, 2017 reply, Ms. Kaffka wrote, among other things, that she would finish the film “as agreed” and hand in the completed cut to Ms. Whitehall by August 15, 2017. That hand-off never happened. I find that due to Ms. Kaffka’s improper withholding of the film, the applicant has lost the ability to promote and market the film as planned.

32. I agree with the applicant that Ms. Kaffka did not become an owner of the film because she may have become a co-executive producer with an associated film credit. Quite apart from the *Copyright Act* provisions, this conclusion is supported by the applicant's statement from a Director/Producer, Jonathan Tammuz. It is also supported by Carole Britton, a member of the Production Office Department of IATSE 891, which she says is the main union representing crew on movie and television productions. It is also supported by the statements of Christine Lippa, of RED Talent Management and of Tabatha Golat, a Director/Producer. The respondent has provided no evidence in response to the issue of the film's ownership, apart from her own submissions and a series of nearly identical letters from people who worked on the film and simply said the respondent was a co-executive producer.
33. In Ms. Lippa's letter, she sets out the distinctions between the various roles. I accept her evidence, which I find is consistent with the rest of the evidence before me, and which I find the respondent did not particularly dispute. In particular, Ms. Lippa states that there is no ownership held by any role other than the executive producer. As for the executive producer, she wrote that its role involved: overseeing and providing for the film's financing, responsible for all decision-making and liabilities, forming a production company if one does not exist, distributing, marketing and promoting the film, and has final say on the edited, authorized version of the film. Ms. Lippa wrote that on most independent low-budget films, the writer is often the executive producer, and maintains "full ownership and control of the film project". Based on the evidence before me, I find the applicant and Ms. Whitehall, not the respondent, fulfilled the role of executive producer on the film.
34. There is no contract or option agreement before me that would entitle the respondent to ownership rights over the film. I do not accept the respondent's submission that the parties verbally agreed that Ms. Kaffka would have those ownership rights. As noted above, even if the applicant offered her a co-executive producer credit, I find this does not mean Ms. Kaffka obtained ownership rights.

35. In summary, I find the film is owned entirely by the applicant, as owner of the copyright. I do not agree that the applicant ever gave up any of its ownership rights to the respondent.

Remedies

36. Given the applicant is the film's sole owner, I find that the respondent must immediately return to the applicant, through Ms. Whitehall, the film's external hard drives containing all of the film's raw footage, along with any cables or attachments, with no damage to the property or its contents.

37. For the same reasons, I find the applicant is entitled to the return of all non-expendable film props and wardrobe, including "the red dress", undamaged.

38. I also find the respondent must remove all social media posts about the film that infringe the applicant's copyright, and refrain from such future posts. This includes posts that show any clips from the film.

39. The applicant also seeks \$5,000, half of the film's production costs, essentially on the basis that she has lost momentum in promoting the film at festivals together with another of her successful short films. I agree that the respondent has improperly withheld the film and its related work product from the applicant, since the days of shooting in May 2017. I find the respondent wrongly appropriated the film as her own to control.

40. The challenge is quantifying the applicant's loss. The tribunal's monetary jurisdiction is \$5,000 per claim. I find that the \$5,000 claim is properly distinct from the applicant's other claims for the return of the film's hard drives and the wardrobe and props.

41. However, I cannot agree that \$5,000 is appropriate. The applicant has not provided sufficient evidence to support her claim that she should receive half the film's budget as compensation. The film's production cost is not necessarily the appropriate measure of damages. The evidence is that the film's profits were

always expected to be low, if any, which is why the performers were largely volunteers. However, while the applicant's "soft" costs in losing momentum are difficult to quantify, they are still a loss.

42. On balance, I find that an appropriate award is \$3,000 for the respondent's improper withholding of the film over the last year.
43. The applicant was successful. Under section 49 of the Act and the tribunal's rules, I find the applicant is entitled to reimbursement of \$175 in tribunal fees.

ORDERS

44. I order that:
 - a. The respondent must immediately return to the applicant, through Ms. Whitehall, the film's external hard drives containing all of the film's raw footage, along with any cables or attachments, with no damage to the property or its contents.
 - b. The respondent must immediately return to the applicant, through Ms. Whitehall, all non-expendable film props and wardrobe, including "the red dress", undamaged.
 - c. The respondent must immediately remove all social media posts about the film that infringe the applicant's copyright, and refrain from such future posts. This includes posts that show any clips from the film.
 - d. Within 14 days of this decision, the respondent must pay the applicant \$3,175, comprised of \$3,000 in damages and \$175 in tribunal fees. The applicant is entitled to post-judgment interest, as applicable.
45. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The

time for filing a notice of objection is 28 days after the party receives notice of the tribunal's decision.

46. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Shelley Lopez, Vice Chair