[GB] The Intellectual Property Enterprise Court determines that the ‘Del Boy’ character in Only Fools and Horses can be protected under copyright as a literary work

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Julian Wilkins
Wordley Partnership

The Intellectual Property Enterprise Court (IPEC) has determined that a dining experience company, Only Fools The (cushty) Dining Experience and other associated defendants (collectively referred to as the Dining Experience) had borrowed characters and features from the successful Only Fools and Horses TV comedy series (OFAH) thus infringing its copyright. Further, the IPEC determined that the character of ‘Del Boy’ was a literary work and the Dining Experience had infringed its copyright by using many distinctive characteristics. This is the first time in the UK that copyright has been found to subsist in a character itself, independent of the underlying work. The claimant’s claim for passing off also succeeded.

The Claimant was Shazam Productions Limited (Shazam) who owned the rights to the OFAH scripts. Shazam was formed by the late scriptwriter John Sullivan who wrote the OFAH scripts. Shazam was run by his family and licenced the rights, for instance to the BBC who had originally produced the TV series. There was also a successful West End theatre version of OFAH which acknowledged that rights had been licensed from Shazam.

The Dining Experience had created a theatrical experience for its audience by providing an interactive three-course meal while actors played the characters of OFAH such as Del Boy and his younger brother, Rodney. The actors had the appearance, behaviour and voices of the OFAH characters and used their phrases.

Although the Dining Experience had created its own script, it used jokes from the original scripts. The characters replicated, albeit according to the Defendants' evidence in an exaggerated way, those from the TV series. The Dining Experience also used the music and lyrics written by John Sullivan from the OFAH TV show.

The IPEC decided that UK copyright existed in each of the scripts but that there was no overall copyright in a compilation of the scripts. The court also upheld the copyright in the theme song and lyrics.

The Judge (John Kimbell Q.C., sitting as a Deputy High Court Judge) held that copyright subsisted in the character of Del Boy as a literary work for the purposes

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of copyright law.

The Del Boy character was not a stock character or cliché but was a creation of John Sullivan's intellectual work and was based upon his experiences growing up in London. The Judge compared some of the scripts with the TV production. The character was not an interpretation by its actor, but Del Boy's characteristics had been written into the script, for instance mispronounced French, and stock phrases such as 'Lovely Jubbly' and 'Cushty'. The character was indiscernible from the script and its dialogue. The Judge did not consider that the Del Boy character was a dramatic work in copyright law.

The court used the two-stage test set out in *Cofemel v G-Star Raw*, Case C-638/17, and held that both the 'originality requirement' and the 'identifiability requirement' were met. Such approach was consistent with that taken by the German and US courts when determining rights relating to fictional characters.

The Dining Experience contended that their show was intended to be a homage or a form of pastiche, caricature or parody. The court disagreed given the clear use of copyrighted material, and inconsistencies in evidence between key members of the defendants creative and production team. Furthermore, their marketing material promoted the show as if the audience were actually sitting in the TV show.

The Dining Experience was neither parody nor pastiche using the fair dealing exception under section 30A of the Copyright, Designs and Patents Act 1988. The fair dealing exception of parody requires a defendant to show they were evoking an existing work while being different to it, and the intention must be to express humour or mock the work, or engage with it critically (this is a principle taken from the Deckmyn case). However, the Dining Experience made significant use of characters, backstories and the language so their work was akin to a facsimile.

Likewise, the defence of pastiche failed as the Dining Experience was effectively recreating what was in the TV show instead of creating an original production that alluded to OFAH but maintained its own uniqueness and originality.

The Court upheld the passing off claim finding that Shazam had goodwill in the title OFAH and lead characters, especially Del Boy. The Dining Experience had misrepresented their production name to suggest it was licensed or approved by Shazam with the consequential risk of misleading or confusing an audience with the risk they may attend the Dining Experience instead of the recently launched West End theatre version of OFAH.

Shazam Productions v Only Fools the Dining Experience [2022] EWHC 1379 IPEC

http://www.bailii.org/ew/cases/EWHC/IPEC/2022/1379.html

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