

Kluwer Copyright Blog

Why do only fools and horses write original material? UK court finds copyright infringement of ‘Del Boy’ character

Sean Ibbetson, Maria Ryan (Bristows LLP) · Monday, July 11th, 2022

Introduction

The Intellectual Property Enterprise Court (IPEC), part of the English High Court, has ruled that copyright subsists in the character of Derek ‘Del Boy’ Trotter and that a character can be protected as a literary work under the UK’s closed list of copyright works ([2022] EWHC 1379 IPEC). That copyright was found to have been infringed by the creators of an ‘interactive dining experience’ which used Del Boy and the other main characters from ‘Only Fools and Horses’, one of the most successful British TV comedies of the 1980s and 1990s.



Photo by PJ Gal-Szabo on Unsplash

The case is the first time a character has been found to be a protectable work under UK copyright law. It sets out a two-stage test for establishing that a character is a protectable work, following *Cofemel*, and looks at the rarely relied on fair dealing exceptions of parody and pastiche.

Background

The case concerned the show [Only Fools and Horses](#) (‘OFAH’), a BBC TV comedy originally broadcast between 1981 – 1991 and written by John Sullivan. The claimant was a company controlled and owned by the family of John Sullivan, who died in 2011. The aim of the company was to exploit the IP rights held by John Sullivan in connection with OFAH. Shazam had entered into merchandising agreements with the BBC and launched ‘Only Fools and Horses – The Musical’ (The OFAH Musical) in early 2019.

In 2018, the defendants set up ‘Only Fools The (cushty) Dining Experience’ (‘OFDE’) in which

actors adopted the appearance, mannerisms and catchphrases of the original OFAH characters. The characters acted out a pub quiz scene, which had not appeared in the show itself, while customers enjoyed a three-course meal.

The defendants did not seek approval from the claimant in relation to the OFDE and, as a result, in 2019 the claimant sued the defendants for copyright infringement and passing off. In 2020, the case was moved from the High Court to the IPEC due to the defendant's inability to afford a High Court case.

The Works

The claimant alleged that copyright subsisted in each script, the body of scripts (including the "imaginary world" and characters that the body of work encapsulated) and, unusually, the character of Del Boy. The Judge confirmed that each script was a copyright work and would be classed as a dramatic work, following the Court of Appeal decision in *Martin v Kogan*.

The Judge held that the body of scripts would not constitute a separate work, as it was not intended to be performed in a continuous manner and the body of scripts was nothing more than a compilation of separate works. In doing so, the Judge rejected the claimant's submission that there had been intellectual creation in the development of the OFAH 'world' itself.

On the possibility of copyright subsisting in the character Del Boy, the Judge explained: "*There is surprisingly little discussion in English case law or commentary on whether (and if so in what circumstance) copyright might subsist in a character from a dramatic or literary work*". As such, the Judge applied the 'two-stage test' laid down by the Court of Justice of the EU in its *Cofemel* judgment: first, whether the character was original subject matter and, second, whether the character could be identifiable with sufficient precision and objectivity.

On the first point, the Judge held that the character Del Boy was an original creation by John Sullivan for a number of reasons:

- the character was based on Sullivan's lived experience growing up in South London in the 50s and 60s;
- the character of Del Boy was not a "*stock character or cliché*" but instead a "*fully rounded character*" with a detailed backstory, including his complex relationship with his brother;
- Del Boy's use of mangled French to appear sophisticated added to the originality of the character;
- Del Boy's catch phrases, mannerisms and optimistic nature all formed part of his unique character; and
- while each characteristic in isolation may not be distinctive, it was the particular combination of those parts that made the character of Del Boy distinctive.

On the second limb, the Judge found that the descriptions of the Del Boy character included in the OFAH scripts meant that the features of Del Boy that made up his character were "*precisely and objectively discernible in the Scripts*" and could be separated from the performance of the actor David Jason, who played Del Boy in the original OFAH show. As a result, both stages of the test had been satisfied and it was held that copyright did subsist in the character of Del Boy. The Judge confirmed that the character would be covered by the concept of a literary work in the closed list of protected English works without any strained interpretation of the Copyright, Designs and Patents Act 1988 ('CDPA').

This is the first time that a fictional character has been found to be protected in the UK as a copyright work. It is noteworthy for a number of reasons.

First, it is another example (following *Response Clothing*, which we covered [here](#)) of the UK courts grappling with the potentially very wide ramifications for copyright subsistence which flow from the two-stage test set out by the CJEU in *Cofemel*. This decision highlights the broadening in scope of copyright, and the increasing difficulties which UK courts are likely to face when squeezing a claimant's work into the closed list of protected works provided for in the domestic legislation.

Second, it gives rise to a whole host of questions. The first part of the *Cofemel* test requires originality, but will all 'fully formed' fictional characters benefit from protection, or did Del Boy meet a higher threshold? What about those characters who have some original catchphrases and a distinct personality and backstory, but then also a large dose of cliché? The second part of the *Cofemel* test requires the work (in this case the character) to be "identifiable with sufficient precision and objectivity", and the court held this to be satisfied by virtue of the scripts for OFAH. But at what point in the scripts was the Del Boy character sufficiently formed to satisfy this requirement, given that OFAH had 64 episodes plus Christmas specials, released between 1981 and 2001.

The Infringement

After finding that copyright subsisted in the characters and scripts, the Judge found that there was substantial copying of the character Del Boy in the OFDE script and performance, including the character's iconic catch phrases and involvement in dodgy dealings, with evidence showing that the aim of the OFDE was to create a "*pitch-perfect*" live version of the Del Boy character. In relation to the OFAH scripts, the Judge found that there were a great deal of commonalities between the OFAH and OFDE scripts, which were a result of "*extensive indirect copying from the scripts*".

The Defences

The defendants attempted to rely on the defence of fair dealing, set out in Section 30A CDPA, in particular for the purposes of parody and pastiche. This provision was inserted into UK law in 2014, and has its origins in Article 5(3)(k) of the [InfoSoc Directive](#). Whilst the parody exception has attracted much commentary, this is the first time that the defence has been tested by a UK court.

The Judge considered the natural meaning of the words 'parody' and 'pastiche', as well as academic commentary and the CJEU jurisprudence (in particular *Deckmyn* and *Pelham*). He confirmed that a parody must be in itself an expression of mockery or humour. It had to express an opinion about something (either the original work or something else) and not merely be an imitation. It was clear that the OFDE was not a parody as its aim was not to mock OFAH or a third party, and any humour in the OFDE was derived from the borrowed material. The parody defence therefore did not apply.

To qualify as pastiche a work should imitate the style of another work, or compile a number of styles, while being different to the original work. The OFDE did not imitate the style of OFAH, and instead took the whole character population and backstory and recreated them. As such, OFDE was held to be more a recreation or adaptation than a work of pastiche.

In any event, the Judge found that the defendants were not eligible to rely on the exceptions, as each defence was subject to the ‘fair dealing’ requirement, which is derived from Article 5(5) of the InfoSoc Directive. The defendants had not been engaged in fair dealings for the purpose of Section 30A CDPA. As the owners of the rights, the claimant was entitled to control how their copyrights were used, therefore, the existence of the OFDE without permission from the claimant unreasonably prejudiced the legitimate interests of the claimant. In addition, the OFAH works had been copied for the purpose of commercial exploitation, which was likely to affect the sales of tickets for The OFAH Musical.

Passing Off

In addition, the Judge held that the OFDE amounted to passing off, on the basis that Shazam owned goodwill in the name ‘Only Fools and Horses’ as well as the leading characters such as ‘Del Boy’, and that a significant number of people would be deceived into thinking that OFDE was an authorised ‘spin off’ from the TV programme.

Conclusion

As mentioned above, this case shines a light on the issues associated with the UK’s closed list of copyright works, which makes applying EU law concepts of copyright difficult. This problem is only likely to intensify as claimants bring copyright claims for ever broader types of work. The decision that a character can be protected by copyright law is certainly a novel one for UK practitioners although, as the judgment noted, it is an outcome which is apparently consistent with the position taken in Germany (Pippi Longstocking) and the USA (Sherlock Holmes).

The court’s application of the parody and pastiche defences was less surprising, but no less interesting given how rare it is for these defences in particular to be tested in the courts.

It will be fascinating to see if the defendants have the appetite for an appeal, as this judgment certainly raises issues which one would expect to be of interest to the Court of Appeal.

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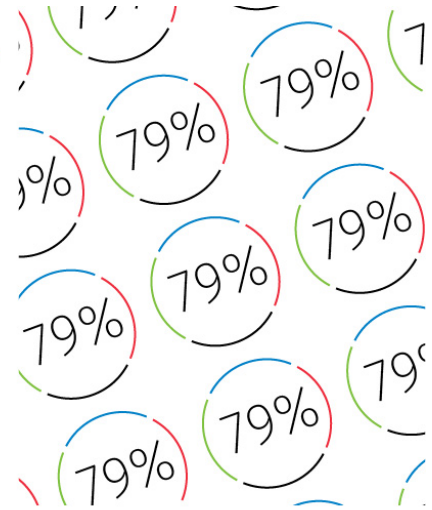
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