

Lovely Jubbly? Fictional Characters Are Capable of Copyright Protection in The UK

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Considering the UK's rich history of literature, it may be somewhat surprising to know that there was very little case law discussing whether copyright might subsist in a fictional character. However, on 8 June 2022, the UK courts finally tackled whether a fictional character can be protected under copyright law in [Shazam Productions Ltd v Only Fools The Dining Experience Ltd & Ors](#) [2022] EWHC 1379 (IPEC).

The Court ruled that fictional characters are capable of copyright protection as literary works provided that it is identifiable and original. With this determined, the Court ruled that defendants' infringements were "overwhelming and obvious" and that they had committed copyright infringement.

Background

Only Fools and Horses ("**Only Fools**") is a famous British television comedy series written by John Sullivan. The series ran between 1981 and 1991 (plus a final Christmas special in 2003) and followed a cast of iconic characters in their attempts to become a millionaire by next year (every year). These characters included Del Boy, Rodney, and Uncle Albert. The rights of *Only Fools* are owned by a company owned and controlled by the estate of the late *Only Fools* scriptwriter, Shazam Productions Limited ("**Shazam**").

In 2018, the defendant, Only Fools The Dining Experience Ltd ("**OFDE**") (amongst others), opened an interactive dining show titled "*Only Fools The (cushty) Dining Experience*", featuring a script written by OFDE using the characters, catchphrases, and themes of *Only Fools*.

Shazam sent a warning letter claiming that they had copyright over:

- the *Only Fools* scripts, both individually and as a whole;
- the characters, including Del Boy's characteristics in how they create his 'persona'; and
- the lyrics and theme song for *Only Fools*.

Shazam then initiated proceedings against OFDE, who in turn claimed the defences of parody and pastiche in relation to the dining experience.

Key Findings

Is a character capable of protection?

The IPEC upheld all of Shazam's claims, except their argument that a body of scripts was a piece of work as a *whole*. It held that the two cumulative conditions set out in *Cofemel* decision were met, i.e. that:

1. a work reflects the personality of its author (the originality requirement); and
2. the subject matter is identifiable with sufficient precision and objectivity (the identifiability requirement).

Judge Kimbell QC found that the character of Del Boy easily passed the originality requirement, because of:

- John Sullivan's own background and the connection of the character to his personal experience;
- the complexity of the character, including backgrounds, relationships and motivations; and
- the language used by Del Boy, including his mangled French and his genuine impact on the development of the English language through words such as 'lovely jubbly' or 'plonker'.

In assessing the identifiability requirement, John Kimbell QC watched a number of episodes of Only Fools and was struck by how much Del Boy was described in the script, including his consistent development throughout the series.

Is a series of scripts a work as a whole?

While the Court accepted that OFDE's script had elements of copyright infringement, it did not accept that a body of scripts, taken as a whole, attracted copyright protection. In doing so, it noted that only the individual scripts were intended to be performed, and that it cannot be suggested that they were intended to be performed continuously. While there are examples of literary works being published in chapters then republished as a single work, there was no evidence to suggest that Only Fools was ever intended to be a unitary whole.

Did the defences of pastiche or parody apply?

The Court rejected both defences raised by the defendant. In rejecting the parody defence, the Court made it clear that OFDE was not intending to mock Only Fools and that the humour came from Only Fools itself, not OFDE. As the work was not an expression of mockery or humour, OFDE could not be a parody. In addition, since the work lifted the characters of the work wholesale, it was not imitating the style and thus was not pastiche. Furthermore, the Court rejected that there had been 'fair

dealing', as the work was copied for commercial gain.

Comment

The judgment has attracted conflicting views from legal commentators, but brings UK copyright protection into a consistent line with cases from other countries, such as the *Pippi Longstocking* decision made in Germany (case reference I ZR 52/12) and *Sherlock Holmes and Dr Watson* decision in the United States (Klinger v. Conan Doyle Estate, Ltd.).

Whilst this is good news for all creators and helps defend unique characters of fiction from unfair dealing, businesses that have previously used literary characters in their marketing, promotions and as themes will need to take extra care when using a literary character without licence from the rights holder.

In order to rely on the defences of parody and pastiche, use of the literary characters must be more than blatant imitation, and must add additional features to the work in a humorous or mocking fashion. It is also important to remember that there must be fair dealing in the use of the literary character as failing at this hurdle would scuttle both defences.

Businesses should therefore think carefully before deciding to use a literary character, and in any event should at least make the jokes original – “*Alright, Dave*”?

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