

# Copyright protection for fictional characters: you know it makes sense!

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For the first time in English law, the High Court has ruled that a fictional character can be recognised as a copyright work. This decision is welcome news for authors and script writers. They will now be able to oppose the use of their recognisable fictional characters in new, original stories and settings that they did not write or create.

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For the first time in English law, the High Court has ruled that a fictional character can be recognised as a copyright work (*Shazam Productions Ltd v Only Fools The Dining Experience Ltd and others [2022] EWHC 1379 (IPEC)*). The court held that the character “Del Boy”, from the famous British TV sitcom “Only Fools and Horses” (OFAH), is a protected work.

## Background

John Sullivan wrote the scripts for OFAH, which was broadcast by the BBC across seven series from 1981 to 1991, with further special shows being broadcast until 2003. OFAH has won multiple awards, and John Sullivan won the Writers’ Guild of Great Britain’s top comedy writer award in 1996. John Sullivan set up a company, Shazam Productions Ltd (Shazam), which is now run by the Sullivan family, to manage and commercialise the intellectual property in various works created by John Sullivan, including OFAH.

The defendants decided to develop an interactive dining show using the characters from OFAH. The show was produced and marketed under the name “Only Fools The (cushty) Dining Experience” (OFDE) (*see box “The dining experience”*).

Shazam issued proceedings for copyright infringement of the characters and scripts of OFAH, and also for passing off.

## High Court decision

The court held that copyright infringement and passing off had taken place. It considered the following two requirements set out in *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV* to determine whether the fictional character Del Boy qualified as a copyright work:

- An original subject matter exists, in the sense of being the author’s own intellectual creation (first limb).
- Classification as a work is reserved to the elements that are the expression of that creation (second limb) ([www.practicallaw.com/w-024-1486](http://www.practicallaw.com/w-024-1486)).

The European Court of Justice (ECJ) stated in *Levola Hengelo BV v Smilde Foods BV* that the second limb only includes elements that can be identified with sufficient precision and objectivity (*C-310/17*).

With regard to the originality requirement in the first limb, the court held that there was more than enough evidence to show that Del Boy was the original creation of John Sullivan. The court highlighted features such as Del Boy’s complex motivations, the various layers to his character and personality, his full backstory, catchphrases and expressions, including his use of mangled French, which “expressed a desire on his part to appear suave and sophisticated whilst at the same time providing comic effect

because the phrases were used incorrectly”. All of these features were creative choices of John Sullivan, to which a great deal of thought and attention had been given.

With regard to the second limb, the court held that the features of Del Boy relied on by Shazam as constituting his character were precisely and objectively discernable in the OFAH scripts.

The defendants sought to argue that case law requires the articulation of an external appearance of a character, which, it argued, was absent from the OFAH scripts. Without deciding the point, the court highlighted multiple examples taken from the OFAH scripts to show that Del Boy’s external appearance was described at various times by John Sullivan.

Having established that Del Boy is a protected literary work, the court held that infringement had taken place, with the evidence being overwhelming and obvious, citing the defendants’ evidence of attempting to be “pitch perfect” in portraying the character.

The court’s finding that a fictional character can be a copyright work brings English law in line with international jurisprudence, such as in Germany and the US (*Re Pippi Longstocking* [2014] ECC 27; *Klinger v Conan Doyle Estate Ltd* 755 F3d 496, 498 7th Cir 2014).

## Purpose of parody

*Shazam* also provides guidance on the defences of fair dealing with a copyright work for the purposes of parody and pastiche under section 30A of the Copyright, Designs and Patent Act 1988. Referencing the Belgium case *Deckmyn and another v Vandersteen and others* and the Advocate General’s opinion given when the case was referred to the ECJ, the court stated that there are two types of parody covered by the defence:

- Parody directed at or concerned with the original work.
- Parody where the original work parodied is merely the instrument of an intention aimed at a third-party individual or object (*C-201/13*).

To succeed with a defence of parody, the court held that a defendant must establish that the new, allegedly infringing work:

- Evokes an existing work.
- Is noticeably different from that existing work.
- Constitutes an expression of opinion expressed as humour or mockery.

In addition, there must be some critical distance between the new work and the original work. In *Shazam*, the court held that OFDE was not a parody. It was closer in form to a reproduction of OFAH by adaption to a live dining setting, than parody.

## Imitation not pastiche

The court held that the two essential ingredients for pastiche are that:

- The use imitates the style of a pre-existing work, or it is a medley or assemblage of a number of pre-existing works.
- In both cases, the end product is noticeably different from the original work.

The court found that OFDE did not imitate the style of OFAH, but that OFDE took the characters, with their full backstories and catchphrases and simply represented them in a live dining format. In addition, it held that OFDE was created with the aim of giving the audience the feeling that they are meeting the characters from OFAH, rather than being an attempt to use the style of OFAH. Therefore, OFDE was not a pastiche, but an imitation of OFAH.

## Lessons for copyright holders

This decision is welcome news for authors and script writers. They will now be able to oppose the use of their recognisable fictional characters in new, original stories and settings that they did not write or create. They no longer have to prove that the underlying literary or dramatic work in which the fictional character was created by them, such as a novel, play, TV episode or film script, has been copied.

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### The dining experience

The premise of “Only Fools The (cushty) Dining Experience” (OFDE) was simple: diners partook in a sit-down meal and were served by actors playing the characters of John Sullivan’s TV sitcom “Only Fools and Horses” (OFAH), including Del Boy, Rodney and Uncle Albert. The actors acted out a story around, and involving, the audience members. The actors adopted the mannerisms, appearances and voices and also used the catchphrases of the characters in OFAH and some of their jokes, all of which were created by John Sullivan. The characters’ backstories, their wants and desires, which were created and developed by John Sullivan for OFAH, were carried over in OFDE. However, the characters were presented in the context of an interactive pub quiz, set at OFAH’s Nag’s Head pub, which never happened in OFAH.

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