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Claim No. IP-2021-000001

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT (Ch.D)

Royal Courts of Justice
Rolls Building, London, EC4 1NL
Date: 8 June 2022

Before:
JOHN KIMBELL Q.C.
(sitting as a Deputy High Court Judge)

B E T W E E N:

SHAZAM PRODUCTIONS LTD

Claimant

- and -

- (1) ONLY FOOLS THE DINING EXPERIENCE LTD**
- (2) IMAGINATION WORKSHOP PTY LTD**
- (3) ALISON GAY POLLARD-MANSERGH**
- (4) PETER GORDON MANSERGH**
- (5) KATHARINE MARY GILLHAM**
- (6) IMAGINATION WORKSHOP LIMITED**
- (7) IMAGINATION WORKSHOP FESTIVAL LIMITED**
- (8) JARED HARFORD**

Defendants

JONATHAN HILL (instructed by **Ashfords LLP**) for the Claimant
THOMAS ST QUINTIN (instructed by **Brandsmiths**) for the First to Third and Fifth to
Eighth Defendants

Hearing dates 1 - 3 March 2022

APPROVED JUDGMENT

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John Kimbell QC, sitting as a Deputy High Court Judge:

A. INTRODUCTION

1. Only Fools and Horses (**'OFAH'**) is a well-known television comedy. It was originally broadcast by the BBC in 64 episodes over seven series (1981 – 1991) and a number of Christmas specials until 2003. The scripts for all the episodes of OFAH (**'the Scripts'**) were written by John Sullivan OBE. He died in 2011.
2. OFAH has as its subject the ups and downs in the life of the Trotter family. It is set in South London during the 1980s and 1990s. The main characters are a market trader, Derek Trotter (**'Del Boy'**), and his younger brother, Rodney, who live together in a high-rise council flat in Peckham. The third occupant of the flat was originally Derek and Rodney's grandfather but he was later replaced by an elderly uncle (**'Uncle Albert'**). Other characters include a louche used car salesman (**'Boycie'**), his wife Marlene, a road sweeper called Trigger and Cassandra, who is Rodney's girlfriend and subsequently his wife.
3. OFAH won the British Academy Television Award for best comedy series three times - in 1986, 1989 and 1997. It was awarded the National Television Award in 1997 for most popular comedy series and the Royal Television Society Award in 1997. John Sullivan won the Writers' Guild of Great Britain top comedy writer award in 1991 and the best situation comedy writer award in 1997 for OFAH. There have been two spin-off sitcoms broadcast by the BBC: one is a sequel to OFAH, called The Green Green Grass (2005-2009). This features Boycie and Marlene. The other is Rock and Chips (2010-2011), which is a prequel to OFAH. Rodney and Del Boy also appeared in opening ceremony of the London Olympics in 2012 replaying a scene from OFAH in which they dress as Batman and Robin. The fact that they appeared in the ceremony, some nine years after the last OFAH special Christmas episode was broadcast, is an indication of its impact and national resonance with the public.
4. The Claimant (**'Shazam'**) is a company owned and controlled by John Sullivan's family. Shazam was formed in 2003 to exploit the intellectual property rights held by

John Sullivan in connection with OFAH (as well as other shows written by him, such as ‘Citizen Smith’).

5. In February 2019, Shazam launched a musical based on the characters from OFAH at the Theatre Royal Haymarket (**‘the Musical’**). The Musical is written by John Sullivan’s son, Jim Sullivan, and Paul Whitehouse.

OFDE

6. In May 2018, the Third Defendant (Ms Pollard-Mansergh) and the Fourth Defendant (Mr Mansergh) 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’**). The actors in the OFDE Show used the appearance, mannerisms, voices and catchphrases of Del Boy, Rodney, Uncle Albert, Cassandra, Boycie, and Marlene as they appeared in the broadcast version OFAH. The backstories of those characters and their relationship to each other as that had developed by Series 6 of OFAH was carried over into OFDE. The characters were presented, however, in a new context of an interactive pub quiz, which had not appeared in OFAH itself.
7. Whilst the audience is being served a three-course meal, the actors in the OFDE Show perform scenes based on a script produced collaboratively by a number of people over the course of a few weeks.¹ The script was compiled by the Fifth Defendant. It gave flexibility for the actors to interact spontaneously with the diners and to improvise. OFDE was usually performed in hotel function rooms in front of an audience of no more than 120.
8. The commercial vehicle for developing the OFDE Show initially was the Second Defendant (**‘ITI’**). However, the rights to OFDE were subsequently transferred to the First Defendant.

FTDE

9. OFDE was not ITI’s first venture in the area of TV-show themed dining shows. ITI had for many years offered a similar interactive dining experience based on the characters

¹ A full list of the individuals said to have collaborated was provided by Brandsmiths in a letter dated 14 June 2021.

from the BBC comedy Fawlty Towers. This was called the Faulty Towers Dining Experience ('FTDE').

10. The aim of both FTDE and OFDE was the same. It was to make the audience feel that they are in the presence of the characters they knew and loved from the respective television show. The idea was for the audience to feel immersed in "a similar imaginary universe" to that created by the TV show in each case. A marketing email for the OFDE Show said this:

"Only Fools The (cushty) Dining Experience is an immersive theatre show created in loving tribute to the BBC's Only Fools & Horses TV Series. The ITI show does not use script or music from the TV series"

The first letter before action

11. In July 2018, solicitors instructed by Shazam wrote to the Second and Sixth Defendants to complain that, based on the advance publicity they had seen for OFDE, any performance would inevitably involve an infringement of the intellectual property rights held by Shazam. Mr Mansergh responded to this letter by saying that:

"Having had long discussions with my legal counsel, trademark and patent attorneys, I am satisfied that no trademark, copyright or PRS infringements will result due to performances of the tribute/improv show/pub quiz/trivia night: 'Only Fools The (cushty) Dining Experience'".

12. OFDE began to be performed in September 2018. It has continued since then save for a period when due to Covid outbreak performances were not possible.

The second letter before action

13. On 22 July 2019, solicitors on behalf of Shazam sent a further letter before action. The letter enclosed a draft Particulars of Claim. This alleged that OFDE constituted a copyright infringement and passing off in respect of OFAH. It sought voluntary undertakings to cease those activities.
14. Brandsmiths were instructed to respond on behalf of the First to Fourth Defendants. They answered the letter the very next day. No undertakings were offered and all the allegations were denied.

Issue of proceedings

15. Proceedings were subsequently issued in the High Court (Chancery Division) on 19 December 2019. No interim injunction was sought preventing OFDE from being performed.

The Works

16. The Particulars of Claim allege that copyright subsists in the following works (**'the Works'**):
- a. Each script for an episode of OFAH
 - b. The body of scripts for OFAH taken as a whole, which collectively establish the characters, stories and imaginary "world" of OFAH
 - c. The characters (namely Del Boy, Rodney, Marlene, Cassandra, Uncle Albert, Boycie, Trigger and DCI Slater).
 - d. The lyrics and opening theme song for OFAH

The Defences

17. Separate Defences were filed by the First to Third Defendants and the Fifth Defendant on the one hand and the Fourth Defendant (Mr Mansergh) on the other. By an order made on 29 October 2020, Master Teveson permitted Shazam to amend its Particulars of Claim to add the Sixth to Eighth Defendants. The claim was transferred to IPEC.

The Annexes

18. The Amended Particulars of Claim was accompanied by three Annexes:
- a. Annex 1 described the features of the eight characters said by Shazam to be protected by copyright.
 - b. Annex 2 contained an analysis of two scripts used for OFDE (one from March 2019 and one from September 2019). This identified alleged copying from the Scripts.²
 - c. Annex 3 contained an analysis of a recording of the OFDE Show and particulars of infringement. Shazam alleged that when the actors improvised during the

² Published as 'The Bible of Peckham – Volumes 1-3' by BBC books (1999).

Show they copied additional material beyond the copied material already contained in the scripts for the OFDE Show.

The Order of 25 March 2021

19. On 25 March 2021, HHJ Hacon made an order requiring Shazam to select just one script or one recorded performance of the OFDE and to identify in a schedule 30 features alleged to have been copied from the Works. He further ordered that:

“The issues of (a) whether the Works or any of them were copied and (b) if so, whether the Works or any of them were copied in substantial part shall be determined by reference to the foregoing 30 features only.”

20. Following that order, the Claimant selected the OFDE script from September 2019 as the allegedly infringing work and served its schedule of 30 features.

The CMC Order

21. At a case management conference on 19 July 2021 HHJ Hacon ordered a split trial. He ordered nine issues (**‘the Issues’**) to be tried first. He also ordered the Claimant to identify five additional features from the September Script in relation to the claim of copyright in character of Del Boy. This the Claimant did.

The Infringements Schedule

22. The alleged infringements were very helpfully gathered together in a single streamlined Schedule drafted by Mr St. Quintin. This was initially served with his skeleton but it was then resubmitted at the end of the trial in an agreed form with additional references added by Mr Hill. It is this Schedule (**‘the Infringements Schedule’**) which I will refer to in this judgment.

The alleged character infringement

23. The alleged infringements in the OFAH Show in relation to Del Boy as a character are:
- a. His use of sales patter with replicated phrases
 - b. His use of French to try to convey an air of sophistication
 - c. His eternal optimism
 - d. His involvement in dodgy schemes
 - e. His making sacrifices for Rodney

B. THE ISSUES FOR TRIAL

24. In accordance with standard practice in IPEC, a list of issues for trial was settled at the CMC. The nine issues for trial were as follows:

Copyright

1. Whether the following are literary works for the purposes of copyright law:
 - 1.1. The body of scripts for the Sitcom taken together including whether they collectively establish as an independent work the characters, stories and imaginary “world” of Only Fools and Horses.
 - 1.2. The Character “Del Boy”.
2. Whether the following are dramatic works for the purposes of copyright law:
 - 2.1. Each script used in the Sitcom.
 - 2.2. The body of scripts for the Sitcom taken together including whether they collectively establish as an independent work the characters, stories and imaginary “world” of Only Fools and Horses.
 - 2.3. The Character “Del Boy”.
3. The extent of the commonalities in content between the aforesaid alleged works and the September Script. This Issue shall be determined by reference to the features identified in the Claimant’s Amended Schedule only.
4. Whether, and the extent to which, the aforesaid commonalities were the result of copying, directly or indirectly, from the aforesaid alleged works. This Issue shall be determined by reference to the features identified in the Claimant’s Amended Schedule only.
5. Whether those commonalities which were the result of copying amount either individually or collectively to substantial parts of the alleged works (which for some features includes a requirement to consider whether those features were original to John Sullivan), such that the copying of the September Script and/or performance of the Show to that script infringe any copyright in those alleged works (unless the defence in Issue **Error! Reference source not found.** applies). This Issue shall be determined by reference to the features identified in the Claimant’s Amended Schedule only.
6. Whether any of the Defendants are entitled to defences under s30A CDPA in relation to any of the acts alleged to infringe, in particular:

- 6.1. Were the said acts for the purpose of parody?
- 6.2. Were the said acts for the purpose of pastiche?
- 6.3. Did the said acts amount to fair dealing with the Claimant's works?
- 6.4. Do the said acts conflict with normal exploitation of the Claimant's works?
- 6.5. Do the said acts unreasonably prejudice the legitimate interests of the Claimant?

Passing Off

7. Whether prior to the first of the acts complained of the Claimant owned goodwill associated in the mind of the relevant public with the Name/Indicia, including as sub-issues:

7.1. The nature and extent of the business of the Claimant and its predecessor under the Name/Indicia.

7.2. The extent to which the Name/Indicia have been distinctive of the Claimant's business in the mind of the relevant public.

7.3. Whether the ownership by the BBC of BBC Marks precludes the Claimant from owning any such goodwill or indicates that it does not own such goodwill.

7.4. If the Claimant does own any such goodwill, the date(s) from which it owned that goodwill.

8. Whether or not any of the Defendants:

8.1. have misrepresented that the Show is connected in the course of trade with the Claimant's business.

8.2. intended to make such any such misrepresentations.

9. Whether any misrepresentations found pursuant to paragraph 8 has caused or is likely to cause the Claimant damage.

C. THE WITNESS EVIDENCE

25. Each side called two witnesses. The Claimant called: Mr James Sullivan and Mr Stephen Clark. The Defendants called Alison Gay Pollard-Mansergh and Katharine Mary Gillham.

James Sullivan

26. James Sullivan is a director of Shazam. He is the son of John Sullivan. His fellow directors are his brother Dan, his sister Amy and his mother, Sharon. All were appointed in 2004 to exploit such intellectual property as existed in John Sullivan’s work for the benefit of the family.
27. Mr Sullivan’s statement dated 14 January 2022 is 41 pages long. It describes John Sullivan’s career as a writer, his social background and his methods of working. It also contained information about the various licences granted either John Mr Sullivan prior to Shazam’s incorporation or subsequently by Shazam for spin-off products based on OFAH, including board games, books and commercials. He also described his work on the OFAH Musical with Paul Whitehouse.
28. Mr Sullivan described how he first came to hear of OFDE in the summer of 2018 and his reaction to it:

“108. I find the Defendant’s Show difficult to watch (I have watched a recording made for the purposes of gathering evidence of infringement for these proceedings) and not just because it is, in my opinion, of poor quality, but because of how much of it is ripped from the original scripts written by my Dad. It uses history, lore, characters, traits, relationships, themes, ideas and specific dialogue and well-crafted jokes (set-ups, structures and pay-offs) that originated in my Dad’s scripts. The Defendants have, essentially, written a new episode of Only Fools (albeit, in my opinion, very badly) and in doing so, have copied my Dad’s work.”

“110. The Claimant has not licensed the Defendant’s Show and therefore I have no control over the use of what they have taken from my Dad’s scripts, nor can I do anything to regulate the quality and therefore mitigate the adverse impact the Defendants’ Show might have on the integrity and credibility of Only Fools....”

29. Paragraph 108 crosses the line between admissible oral witness evidence and commentary and argument. Mr St Quintin chose appropriately not to cross-examine Mr Sullivan on it or on many of the other passages of commentary in Mr Sullivan’s witness statement in particular in paragraphs 131 – 279. Nevertheless paragraphs 108 and 110 probably reflect at least part of the motivation for this litigation.
30. Mr Sullivan was not able to give much direct evidence about the writing of OFAH itself. He was only 12 years old when it had already reached its seventh series. It is,

however, clear that Mr Sullivan had spoken in detail to his father about his approach to script writing generally and specifically aspects of OFAH especially after he showed an interest in a career as a script writer when he was 18.

31. Mr Sullivan gave his oral evidence via remote link from his home on medical grounds. He answered questions put to him in a calm and measured manner and without seeking to argue the case.
32. Mr Sullivan was taken to the terms of the merchandising agreements with the BBC. The first was an agreement between Mr Sullivan and the BBC. This was replaced in 2016 by an agreement between the BBC and Shazam. He accepted in cross-examination that the merchandising arrangement with the BBC showed that the BBC had valuable intellectual property rights in OFAH. The terms were that the BBC took 30% of the gross income as a commission and then shared the net merchandising revenue 50/50 with Shazam. It was not put to him that this document meant that Shazam had no commercial or legal interest in the intellectual property rights connected to OFAH generally or in the Scripts specifically. His evidence in relation to sums earned from royalties and merchandising was not challenged. The sums were significant. In 2009, for example, £384,791 (excl VAT) was received in respect of audio and video sales alone. Significant sums were also received in respect of a large range of merchandising, including books, games, advertising, toys, mugs and even a fruit machine and a Scalextric set. The figures set out various spreadsheets and statements for the years 2009 – 2016 were not challenged by Mr St. Quintin.
33. Mr Sullivan was not challenged on his evidence that “Only Fools” is a common shorthand expression for OFAH which was used by his father and others.

Stephen Clark

34. Mr Clark is a journalist and author. He has written two books about OFAH: “*The Only Fools and Horses Story: A Celebration of the Legendary Comedy Series*, BBC Books (1998) with a foreword by Sir Anthony Hopkins and “*Only Fools and Horses – The Official Inside Story*” (2011). I was provided with a copy of the second of these books. In the course of writing this book, Mr Clark spoke to John Sullivan about how he came to write OFAH and his inspiration for the characters in it.

35. Mr Clark provided some helpful background material on some of phrases used in OFAH such as “lovely jubbly” and “cushty” derived from documents consulted by him in the course of writing his books:
- a. “Lovely Jubbly” appears in the Oxford English Dictionary. The entry states that it was “coined by John Sullivan ... as a characteristic expression of Derek Del Boy Trotter”. John Sullivan says he adapted it from the phrase “Lubbly Jubbly” which he heard as a child in the 1950s when it was used to advertise a frozen orange drink. It is used frequently in the popular press in relation to OFAH and Del Boy.
 - b. “Cushty” was not invented by John Sullivan. He had heard the word used in the markets as a child. He believed it was used by British Soldiers in India as a word meaning an easy ride or a good thing. The Oxford English Dictionary identifies other possible etymologies. However, whatever its origins, it was very infrequently used prior to 1981 but was used frequently by Del Boy in OFAH. Since appearing in OFAH it has been used often in the popular press in connection with OFAH.
36. Mr Clark exhibited to his witness statement many examples of the use of both “Cushty” and “Lovely Jubbly” in connection with OFAH and Del Boy. I accept that this evidence establishes that there is a strong association in the minds of the public between both phrases and OFAH and Del Boy in particular.
37. He also provided context for some of the other features of OFAH relied on by the Claimant. He was not challenged on the reliability or accuracy of any of the material he provided to the Court.
- Katharine Mary Gillham**
38. Ms Gillham’s trial witness statement is dated 10 February 2022. In it she gives details of her career and her involvement with OFDE. She gave her evidence live in court. She was a straightforward witness who answered questions about the development of OFDE in a direct and helpful way.

39. Ms Gillham left drama school in 2003. She has worked as an actor, director and producer. She set up her own theatre company, Kat Mary Productions, which put on drama workshops in schools. Between 2016 and 2017 she worked as an actor for a business called “Comedy Dining”. This put on interactive dining experience shows based on TV shows. This included two shows based on OFAH.
40. After parting company with Comedy Dining, she put on her own production of an improvised dining show called “Costa Del Trotter”. This was performed by four actors including Ms Gillham. The show was only performed six times (four times in England and twice in Spain) before Ms Gillham auditioned for the part of Sybil in FTDE.
41. Ms Gillham was not challenged on any of the following background matters:
- a. She mentioned her Costa Del Trotter show to Mr and Mrs Pollard-Mansergh and this led to Ms Gillham and her three fellow actors performing it privately for them. Their reaction was, according to Ms Gillham, “We hate the show but we love you guys”.
 - b. Mr and Mrs Pollard-Mansergh decided between them that ITI ought to develop a dining experience show based on the characters from OFAH.
 - c. Ms Gillham was appointed assistant director. Her principal role was to work with the actors to develop scenes, source props and costumes and make all the practical arrangements for the show, including putting together the script.
 - d. OFDE was intended as a “tribute” to OFAH.
42. In her witness statement, Ms Gillham:
- “Our brief from Alison was essentially to write a new storyline for the characters from [OFAH].”
43. In her oral evidence, Ms Gillham stated that she considered the two OFAH-themed dining shows produced by Comedy Dining Shows to be parodies because:
- “it was very exaggerated comical, not just comical, in Sullivan’s idea of comedy but a more exaggerated representation of the characters. So they were taken to less of a naturalistic level and slightly more overt”

44. Ms Gillham distinguished between her own Kat Mary Production shows, which contained scenes taken directly from OFAH, on the one hand, and OFDE, on the other which did not:

“I recognised that there were iconic moments being used in my show and if she [i.e. Alison Pollard-Mansergh] did not want to use those because the whole thing with [OFDE] is that it is a new scenario in a pub quiz. She did not want to see Del falling through the bar. She did not want to see Batman and Robin. I am saying “Fine, we will rewrite, we will do something else”.

45. In producing a new script for OFDE, Ms Gillham explained that as part of the brief that she and the other actors were given was that they could (and should) use catchphrases such as “This time next year we will be millionaires”, “cushty” and “plonker”, the actors should copy the manner in which the characters spoke as well as using their “given circumstances”.

46. She stressed at various points in cross-examination that the model which she understood was to be her guide for OFDE was the long-running FTDE.

47. Ms Gillham’s evidence revealed the four ways in which the ‘given circumstances’ of the characters from OFAH were worked into the structure of the OFDE Show. First, there was a white board used by the actors to record each characters’ drives, wants and obstacles. Second, some of the actors had a “very intricate” knowledge of the script of OFAH. These actors were described by Ms Gillham as “super fans” of OFAH who could quote from the Scripts because they had grown up with OFAH. Thirdly, key moments from OFAH on YouTube were circulated by e-mail. Fourthly, Ms Gillham and the actors watched some whole episodes of OFAH:

“We wanted to decide when, within the Only Fools world, we wanted to set [OFDE], so we watched some episodes, a few episodes around Season 6 because it was decided that that would be the timeline we would set it in, to get a feel of who the characters were at that time”.

48. The circumstances of the characters fed into a ‘brain dump’ document which was updated from time to time by Ms Gillham as the rehearsals developed. Further changes were made after the first scratch performance in September 2018 in front of an audience.

49. Ms Gillham was clear that the aim was to “recreate” the characters from OFAH, albeit in a new scenario of a pub quiz. This included, for example, the use by Del Boy of mangled French, which she accepted in cross-examination was an essential part of his character:

“Q. If Del Boy did not use any mangled French –

A. It would not be Del, yes”

50. The reproduction of the characters was plainly not intended to be merely approximate. The aim was according to Ms Gillham to produce a “pitch perfect” tribute or homage to OFAH. However, the ambition to create a “tribute show” demanded more than mere pitch perfect impersonation of language and catchphrases. It influenced the structure of the narrative for the OFDE Show. Ms Gillham described this in her witness statement as follows:

“For example, Del’s involvement in dodgy deals is an intrinsic part of his character, so of course we used that characteristic in OFDE but we did so in the context of new and original storylines we had created. Without reference to such characteristics a tribute show cannot exist and the audience would be disappointed because we hadn’t portrayed the characters in a way that they recognized”

51. The actions, reactions and behaviour of Del Boy and the other characters in OFDE Show had in other words to “ring true” for the audience. At the end of her evidence, Ms Gillham returned to her understanding of what ‘pitch perfect’ meant in the context of an interactive dining show from the perspective of the audience. She said this:

“I think saying that it feels like you are inside an episode would be a good, or Alison described it as if it almost feels they are in the real world of it, as if they are there. They feel like “I am having an actual conversation with Del Boy I am not watching him on the telly, I am not separated from him. I am interacting with him, wow, that is exciting.”

52. Ms Gillham played Marlene in OFDE. She said that the effect of the audience participation was that Marlene was presented in a “much more exaggerated manner” compared with the broadcast episodes of OFAH.

53. Although Mr Hill suggested that Ms Gillham was keen to downplay the nature and extent of her involvement in the creation of the OFDE Show, I don't accept that is fair criticism of her. Her evidence as to the brief she was given by ITI and the collaborative and iterative development of OFDE and its aims, as described above, was entirely consistent with the contemporaneous evidence, including both the emails circulating within ITI and the various versions of the draft script for OFDE. I therefore accept it.

Alison Gay Pollard-Mansergh

54. Ms Pollard-Mansergh provided two witness statements. The first was dated 14 January 2022 and the second shorter one was dated 10 February 2022. She gave oral evidence from her home in Australia by video link. This functioned very well with only a very slight delay in transmission.
55. In her witness statement she described founding ITI as a theatre company in Australia in 1996. She described how shortly thereafter ITI began performing the FTDE "in loving tribute" to Fawlty Towers.
56. Her evidence was that ITI decided in May 2018 to create a show "in tribute" to OFAH. She distanced herself somewhat from that decision. She said that she was not a particular fan of OFAH. She said that it was her then husband, Peter, who was keener on the idea. Her evidence was that the purpose of OFDE was "to evoke the imaginary universe of the television series but with completely new storyline and telling new jokes". She added that in terms of the audience experience:

"We want them to have the feeling that they were in presence of characters they are likely to know but not to feel that they were in any of the episodes"

57. Having decided that OFDE show should be set in a pub quiz, Ms Pollard-Mansergh left the actors and Ms Gillham to get on with developing the script for the show.
58. In her oral evidence, Ms Pollard-Mansergh used the word "homage" a number of times in relation to both the FTDE and the OFDE Show. She explained what she meant by this in the following terms:

"So the characters are incredibly well-loved characters and people often, it is a fame thing, they want to be able to interact with, which is something that they

cannot actually do on the television because there is a fourth wall obviously. So when I say an homage, we are giving the characters as much as we possibly can the same life that the actors gave them. So we intend to impersonate very much how they spoke, how they moved, how they, their little finger movements ...”

59. Ms Pollard-Mansergh was clear that she did not want the actors to ham up or exaggerate the OFAH characters:

“I do not want them to go over the top that it becomes like a massive caricature, no. I want them to be able to have fun with characters that they love and to be able to ask them questions and feel that they are taking part in the experience”

Q. ... these characters are striking characters already in the sitcom, in both Fawlty Towers and Only Fools and Horses are they not?

A. Yes

Q. They do not need to be exaggerated in your show.

A. No they do not. No.”

60. I accept the evidence I have set out above from Ms Pollard-Mansergh as to the development of OFDE.

61. To the extent that Ms Pollard-Mansergh’s evidence is at odds with Mr Gillham’s as to whether exaggeration of the characters was part of the intention for OFDE, I prefer Ms Pollard-Mansergh’s evidence. This is because: (a) it is more consistent with the contemporaneous material stressing how the representation of the characters from OFAH needed to be pitch perfect (b) the whole purpose of OFDE was for the audience to experience and interact with the much loved characters they were already familiar with and not to be exposed to a revised, exaggerated or challenging version (c) it was Ms Pollard-Mansergh who set the brief for OFDE and was the one who was ultimately in charge of what was in the script.

D. THE STATUTORY FRAMEWORK

62. The Copyright Designs and Patents Act 1988 (“**CPDA**”) contains a list of types of work which may protected by copyright. Section 1 states:

“1. Copyright and copyright works.

(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—

- (a) original literary, dramatic, musical or artistic works,
- (b) sound recordings, films or broadcasts, and
- (c) the typographical arrangement of published editions.

(2) In this Part “copyright work” means a work of any of those descriptions in which copyright subsists.

(3) Copyright does not subsist in a work unless the requirements of this Part with respect to qualification for copyright protection are met (see section 153 and the provisions referred to there).”

63. Under section 3(1) of CDPA a work cannot be both a literary work and a dramatic work. This follows from the words underlined below:

3 Literary, dramatic and musical works.

(1) In this Part—

“literary work” means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—

- (a) a table or compilation other than a database
- (b) a computer program;
- (c) preparatory design material for a computer program, and
- (d) a database

“dramatic work” includes a work of dance or mime...”

E. THE ALLEGED WORKS

The Scripts

64. It is convenient to address Issue 2.1 in the List of Issues first (as counsel did). Shazam pleads in paragraph 48 of the Amended Particulars of Claim that the Works are “original literary or dramatic works” which protected by copyright pursuant to section 1(1)(a) and s.3(1)(a) of CPDA as set out above.

65. The Defences both admit that the OFAH Scripts (**‘the Scripts’**) were each protected by copyright as “literary works”. However, in his opening and closing submissions, Mr Hill submitted that on proper analysis each of the Scripts was in fact a dramatic work. Mr St Quentin submitted that the Scripts were each either literary or dramatic works but that it did matter which.

66. In my judgement, Mr Hill was correct that each Script was a dramatic work under the CPDA. This is for the following reasons.

- a. Section 3 (1) of the CPDA does not exhaustively define dramatic works. They are merely said to “include” works of dance or mime. In Norowzian v Arks [1999] EWCA Civ 3018; [2000] FSR 363 it was held that film can be a dramatic work. The Court of Appeal in that case disagreed with Rattee J who had held that a film could not be a dramatic work under the CPDA. At p. 367, Nourse LJ (with whom Buxton LJ and Brooke LJ agreed) proposed the following definition of a dramatic work:

“a dramatic work is a work of action, with or without words or music, which is capable of being performed before an audience.”

Nourse LJ continued: “A film will often, though not always, be a work of action and it is capable of being performed before an audience. It can therefore fall within the expression "dramatic work" in section 1(1)(a) and I disagree with the judge's reasons for excluding it.”

- b. In Martin v Kogan [2017] EWHC 2927 (IPEC), HHJ Hacon held that a screenplay for a film was a literary work. The Court of Appeal in Martin v Kogan [2019] EWCA Civ 1645 disagreed and held that a screenplay is a dramatic work:

“[66] We think a screenplay is more accurately described as a dramatic work, as its primary purpose lies in being performed, as opposed to being read, like a novel. The importance of the distinction is put in this way by the authors of *Copinger and Skone James on Copyright*, 17th Edition at para 7.93:

"... a basic distinction between literary works and dramatic works is that the choice of dramatic incident and the arrangement of situation and plot may constitute, to a much greater extent, the real value of a dramatic work. ... It should be remembered that dramatic works include not only plays and screenplays ...".

- c. It is a very small step from the proposition (binding on me) that a film screenplay is usually to be regarded as a dramatic work to the proposition that a script for a TV show is a dramatic work. It is an even smaller step in light of

the undisputed evidence that the internal scenes in OFAH (such as those in the Trotters' flat or the Nags Head pub) were always intended to be (and were in fact) always performed live and recorded before an audience.

- d. When John Sullivan completed each OFAH script the primary purpose was for it to be performed.

67. Each Script was therefore, in my judgement, a dramatic work within the meaning of section 3(1) of the CPDA. The answer to Issue 2.1 is 'Yes'. Each OFAH script was a dramatic work for the purposes of copyright law.

The body of scripts

68. As to whether the Scripts taken as a whole constituted a separate dramatic or literary work, the Claimants' primary case was that the body of the Scripts was a literary work but that in the alternative that the "world" created by John Sullivan was a dramatic work. In each case it was said that the body of Scripts, taken as a whole, attracted copyright protection in its own right above and beyond any copyright in each individual Script. Mr St Quintin submitted that no copyright in the body of works (as opposed to the individual scripts) subsisted at all.

69. Mr Hill's submission, in summary, was that:

- a. The body of scripts may constitute a separate copyright work, providing there has been intellectual creation in the assembly of that body.
- b. If intellectual creation – in the sense of artistic free choices – has been exercised in the creation of linkages between scripts within the body, that would constitute intellectual assembly.
- c. The development of a 'world', including characters ought to attract separate copyright. Otherwise, some of the author's intellectual creation will not be reflected in the copyright arising from their work.

70. Mr St Quintin's submission in summary was that:

- a. In some circumstances, when separately created developments are successively incorporated into a larger compendium, the whole compendium may be considered to be a single work.
 - b. In Sweeney v Macmillan [2002] RPC 35 successive chapters were added to a book. That was a case in which it was appropriate to find that copyright subsisted in the book as a whole, even though copyright would also subsist in a chapter if taken separately. However, that case involved the generation of the content of a single work (conceived as such) in stages. The aim was always to produce a final compendious work. Each chapter was a step towards that goal.
 - c. The situation in this case is different: the Scripts were each created for separate publication and performance. While a body of work did in a sense build up over time, it was nothing more than an agglomeration of separate works.
 - d. Each episode is a complete self-contained story in its own right (save for the ‘two part’ Christmas specials).
 - e. There was no intellectual work involved in compiling the scripts. All that happened is that they were printed one after the other in date order in which they were written, performed and recorded.
71. On this issue, I prefer the submissions of Mr St Quintin. The body of scripts was never intended to be performed as a work in its own right. It was only ever each individual Script was intended to be performed, filmed and then broadcast. No-one would even suggest that the Scripts were ever intended to be performed continuously one after the other. Applying the definition of dramatic work in the case law set out above, the Scripts cannot, in my judgment, be considered to be a dramatic work within the meaning of the CPDA.
72. I am also not persuaded that the Scripts as a body are a literary work in their own right. There are plenty of examples of a literary work being published in chapters and then republished as single work. All but five of Dickens’ novels, for example, were published in this manner. In these circumstances, it is clear that both the individual chapters and the final completed body of work as a whole are each separate copyright works. However, there is no evidence in this case that in 1981 Mr Sullivan conceived where or when the Trotter saga would end or that the body of Scripts were even intended

to be regarded as a unitary whole. The scripts for the first series were created and reduced into writing first in 1981. The second series was only commissioned after the first series had been repeated twice and thereafter each series and Christmas specials were separately commissioned.

73. Mr St Quintin is, in my judgement, correct when he submits that each episode and each special is a complete story in its own right which is intended to be performed, recorded and broadcast separately. When the BBC published the scripts of the series in 1999 it simply printed them in chronological order. There is therefore no evidence of any intellectual creation on Mr Sullivan's (or anyone else's) part in the arrangement of the Scripts in that publication.
74. When I asked Mr Hill to give an example of a body of work in which an English court has held that copyright subsisted as an imaginary "world" created by an author, he was unable to provide one.
75. For all of those reasons, I am not persuaded that the world of OFAH as expressed in the body of Scripts is a literary work in itself for the purposes of copyright law.

The character of Del Boy

76. 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.
77. Mr St Quintin pointed out that what little discussion of this issue there is in case law and the textbooks is rather negative. Mr Hill, on the other hand, submitted that if the standard tests of whether a work has been created which attracts protection are passed, there is no reason why a character cannot qualify as a literary work in its own right. He referred me to the decision of German Supreme Court in Re Pippi Longstocking [2014] ECC 27. In that case, the Supreme Court approved a finding that the character of Pippi Longstocking created by the Swedish author Astrid Lindgren was a protectable literary work in its own right under German copyright law, in addition to any copyright in the stories or books.

78. Mr St Quintin submitted that the Pippi Longstocking decision is the result of the application of principles derived from German domestic law and that in any event the test in that case requires the existence of “particular external features”. Mr St Quintin therefore submitted that Even if the court were persuaded that the test applied by the German courts in Re Pippi Longstocking was 1) good law in Germany, and 2) applicable in this jurisdiction, there is no attempt on the Claimant’s case to meet that test because no external features are alleged to form part of the Character in this case, and none are alleged to have been created by John Sullivan.
79. I turn first of all to the case law and commentary, relied upon by Mr St Quintin as tending to suggest a negative answer to the question of whether copyright can subsist in a character under English law. He referred me first to Kelly v Cinema Houses Ltd [1928-35] MacG.C.C. 362 in which at 368 Maugham J said this at p. 368:
- “If, for instance, we found a modern playwright creating a character as distinctive and remarkable as Falstaff ... or as Sherlock Holmes would it be an infringement if another writer, one of the servile flock of imitators, were to borrow the idea and to make use of an obvious copy of the original? I should hesitate a long time before I came to such a conclusion”.
80. In my judgement, the passage cited by Mr St Quintin does not assist to any significant extent for the following reasons (a) it is plainly obiter dicta (b) it is expressed in the form of a query to which no firm answer is given; and (c) when read in context, the passage is concerned with a broader point, namely that copyright law does not protect mere ideas and certainly not ideas which lack novelty.
81. The Claimant in Kelly v Cinema Houses was the author of a novel. The novel was based on a play called ‘the Outsider’ written in 1923 by a Miss Dorothy Brandon. In 1930, following a revival of the play, the Defendants produced a film which closely followed the story of the play. The author of the novel sued for breach of copyright. Maugham J watched the film and read the novel. He held that “no substantial part of the novel which was not in the play had been reproduced in the film” (p. 366). That decision was upheld in the Court of Appeal on the basis that it involved an application by the judge of the well-established test of infringement i.e. whether a substantial part of the allegedly infringed work has been taken (p.371). It follows that the neither the judgment of Maugham J nor that of the Court of Appeal in Kelly v Cinema Houses is authority for any novel proposition of law, still less a rejection of the proposition that character might be protected by copyright in an appropriate case.

82. The passage relied upon by Mr St Quintin is preceded by the following:

“As was pointed out in the Court of Appeal in the case of Corelli v Gray (30 T.L.R. 116) a new kind of right has been created by s. 1(2) of the [Copyright Act 1919] – as statutory monopoly of a special character; and protection is now given if the performance in public of a play founded on the novel involves the representation of these situations in a dramatic form; but I do not think it follows that mere ideas contained in the novel can be protected. If the plot of a story, whether it be found in a play or in a novel, is taken bodily with or without some minor additions and subtractions for the purposes of a stage play or a cinema film, there is no doubt about the case. But if a character only is, so to speak ‘lifted’ or one or two single situations, the problem becomes more difficult. Can it be said that in relation to performing right, and to that right alone, individual ideas can be protected under the Act?”

Thus when read in context, the passage relied upon is part of the familiar argument that mere ideas are not protected by copyright which acts as a limit on the statutory protection created.

83. Maugham J then went on to deal with the clear case of characters devoid of novelty:

“There can, in my judgment, be no copyright in the idea of a brave and handsome hero, a lovely blonde heroine or an unprepossessing villain with dark moustaches”.

84. The highest it can therefore be put is that the view was expressed in that case is that the lifting of a single character or one or two single situations from a novel for use in a stage play is unlikely to amount to infringement and that characters devoid of novelty will not be protected in copyright. Kelly v Cinema Houses Ltd is not therefore an authority for the proposition that character in a literary or dramatic work cannot be protected by copyright law.

85. The editors of the current edition of Copinger & Skone on Copyright (18th ed. 2021) (*‘Copinger’*) put it this way (at para. 7-265):

“Thus the question is whether the situations or plot have been copied from the novel and then represented in dramatic form. This is not to say that mere ideas or a character can be protected in this way, certainly if the character or ideas are not novel, but if the combination of events which has been taken is not merely trivial, but involves the expression of intellectual creation, there will be an infringement.”

86. The editors of *Copinger* return to the topic of characters in connection with infringement in the context of film in another passage (at para. 26-244) relied upon by Mr St Quintin:

“Where characters from a film are copied borrowing the name and other identifying features but without details of plot or dialogue, a claim for infringement of copyright is unlikely to be successful.”

87. This passage seems also to be focused on what may or may not amount to infringement rather than being concerned with the issue of whether a character from a novel or dramatic work may be protected by copyright. It therefore adds little or nothing to the point already considered.

88. Mr St Quintin also referred me to cases in which copyright protection has been denied to for single invented words such as ‘Exxon’ - Exxon Corp v Exxon Insurance [1982] Ch 119. The reason for this given in the judgment is that the name by itself it conveyed no information, provided no instruction, gave no pleasure and was simply an “artificial combination of four letters of the alphabet which serves a purpose only when used in conjunction with other English words.

89. In Navitaire Inc v Easyjet Airline Co. [2004] EWHC 1725 (Ch) Pumfrey J said the following about attempts to argue that single words were literary works for the purposes of the CPDA:

79. In my judgment, it is not possible to suggest that a copyright subsists in the individual command names as literary works. They do not have the necessary qualities of a literary work. The *Exxon* case wisely skirts the problem of providing a test for a literary work. There was no definition of literary work in the 1956 Act (section 48 merely stated that it included any written table or compilation) and the definition in the 1988 Act is new. When one considers the modern definition (anything written spoken or sung which is not a dramatic or musical work-paragraph 75 above) it becomes essential to eschew any attempt at further definition. A single command name, or the word Exxon, is certainly written, and is plainly neither a musical nor a dramatic work. So why is it not a literary work? Laddie & al. *The Modern Law of Copyright and Designs* (3rd Edn) (hereinafter ‘*The Modern Law*’) suggests that *Exxon* decides that the word is not a work, but warn that it is the composite phrase ‘original literary work’ which is what matters. There is obviously no bright line test. To attempt definitions *ad hoc* (such as, does it convey information or emotion?) is ultimately unhelpful. With great respect, this is particularly the case with old *dicta* from a different world, such as that of Davey LJ in Hollinrake v

Truswell (1894) 3 Ch D 420 , albeit that it was relied on by Stephenson LJ in the *Exxon* case:

‘Now, a literary work is intended to afford either information and instruction, or pleasure, in the form of literary enjoyment. The sleeve chart before us gives no information or instruction. It does not add to the stock of human knowledge or give, and is not designed to give, any instruction by way of description or otherwise; and it certainly is not calculated to afford literary enjoyment or pleasure.’

80. In the 1988 Act, the phrase ‘literary work’ embraces tables or compilations, computer programs, preparatory design material for computer programs and databases. To concentrate on the word ‘literary’ may mislead, but it must not be ignored. In the end, the question is merely whether a written artefact is to be accorded the status of a copyright work having regard to the kind of skill and labour expended, the nature of copyright protection and its underlying policy. It is not sufficient to say that the purpose of the act is to protect original skill and labour: there was plenty of that in *Exxon* . Nor is it of much weight that other forms of protection may be available. I think however, that it is clear that single words in isolation are not to be considered as literary works. The individual command words and letters do not qualify.”

90. However, as the editors of *Copinger* note (at para 3-69) the English courts have been careful not to rule out the possibility that names or titles might in appropriate circumstances be protected.³ In this case the Claimant does not seek copyright protection for the name “Del Boy”. The Claimant’s case is rather that Del Boy as a character as described and represented by the OFAH Scripts is a copyright work. The case law on names and titles cited to me by Mr St Quentin was, in my judgement, of little if any relevance to the issue I have to decide.

91. Despite not being not persuaded by any the above matters set above as being a good reason to be wary of the Claimant’s case that copyright can subsist in a character, the fact is that there is no English case law in which the point has arising for decision, still less a case in which copyright has been held to subsist in a character. In those circumstances, it my judgement, it is necessary to approach the matter from first principles.

³ The footnote cites Francis Day and Hunter Ltd v Twentieth Century Fox Corp Ltd [1940] A.C. 112 at 123. The general rule “does not mean that in particular cases a title may not be on so extensive a scale, and so important in character, as to be the proper subject of protection against being copied” (citing Dick v Yates (1881) L.R. 18 Ch D. 76) and Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 W.L.R. 273 (at 286, per Lord Hodson, saying that Dick v Yates and Francis Day and Hunter “do not support the proposition that, as a matter of law, copyright cannot subsist in titles. No doubt they will not as a rule be protected, since alone they would not be regarded as a sufficiently substantial part of the book or other copyright document to justify the preventing of copying by others”

The two-stage approach

92. It was common ground that the starting point is to ask whether the alleged work qualifies as a work under EU law before asking whether the alleged subject matter can be accommodated within one of the CPDA's categories of protected works. I note that this two-stage approach is also supported by the commentary in *Copinger* at para 3-15.
93. It was also common ground that the correct approach to interpreting the CPDA was that set out in Marleasing SA v La Comercial Internacional de Alimentación SA (Case C-106/89) [1990] ECR I-413 as explained and applied by the English Court of Appeal in Vodafone 2 v Revenue and Customs Commissioners [2009] EWCA Civ 446 [2010] Ch 77 at [37] and [38].

Two cumulative conditions

94. Finally, it was common ground that EU law requires two conditions or requirements to be met for a subject matter to qualify for protection as a copyrighted work. In Case C-683/17 Cofemel v G-Star Raw [2020] ECDR 9 ('Cofemel') at [29] the CJEU stated that according to the settled case law of the European Court⁴ the two cumulative conditions to be satisfied are as follows:

“First, ... that there exist an original subject matter, in the sense of being the author's own intellectual creation.

Second, classification as a work is reserved to the elements that are the expression of such creation”

The originality requirement

95. The first condition is commonly referred to as the “originality requirement”. For it to be met it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his/her free and creative choices.⁵

⁴ In particular, Infopaq International, C-5/08, EU:C:2009:465, paragraphs 37 and 39, and Levola Hengelo, C-310/17, EU:C:2018:899, paragraphs 33 and 35 to 37.

⁵ Painer, C-145/10, EU:C:2011:798, paragraphs 88, 89 and 94 and Renckhoff, C-161/17, paragraph 14.

96. One example where there has not been a free or creative choice is where the realization of the work has been dictated by technical considerations, rules or other constraints, which have left no room for creative freedom – Cofemel at para. 31.

The identifiability requirement

97. The second condition identified in Cofemel at [29] is commonly referred to as the “identifiability requirement”. As the CJEU put it in Levola Hengelo, C-310/17 at [40] and Cofemel at [32], the subject matter protected by copyright “must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form”. The CJEU held the identifiability requirement is not satisfied where an identification is essentially based on the intrinsically subjective sensations of an individual who perceives the subject matter said to be a work. The expressed features must in other words be external to the perceiver and objectively identifiable by third parties and the courts.

Application of the test

98. Applying the two-stage test:
- a. I have no hesitation in holding that Del Boy as a character is an original creation of John Sullivan which is the expression of his own free and creative choices.
 - b. I also consider that the character of Del Boy is clearly and precisely identifiable to third parties in the OFAH Scripts.
99. In relation to the first question, the following evidence is relevant:
- a. John Sullivan grew up in South London in the 1950s and 1960s. This was the ‘golden age’ of the black market. He left school at 15 and worked at Hildreth Market in Balham. It was here that he heard the language and observed the mannerisms of the market traders and second-hand car salesmen of that time. These personal experiences provided the source material for Del Boy and the other OFAH characters.
 - b. Mr Sullivan described his creation of Del Boy in the following terms:

“I took the archetypal fly pitcher with the gold watch and the battered suitcase and decided to give him a family and a home life... I made him a guy with a burning ambition to make it big – but who never quite managed it... Other aspects of, like buying drinks for people down the pub even when he couldn’t really afford to, came from people I knew in the car trade. They always wanted to keep face and even if they were doing badly, they’d borrow money to flash about to let everyone think they were doing well. Wearing lots of gold rings was also part of that”⁶

- c. Del Boy is not a stock character or cliché of a working-class market trader but is rather a fully rounded character with complex motivations and a full backstory. John Sullivan claimed that knew the back story of Del Boy down to very fine details.
- d. A great deal of thought and attention was given to creative choice of how and why Del Boy would express himself.
- e. The use of mangled French by Del Boy was both original and important to the character of Del Boy because it 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. It wasn’t just random school French phrases but phrases which Del Boy might hear around him.
- f. Del Boy created by John Sullivan is both aspirational (“This time next year we will be millionaires”) but is also shown struggling to get by in a gritty multicultural London context of clubs, pubs and tower blocks. Mr Clark reported John Sullivan saying the following:

“I had written a one-page treatment thing explaining the idea. It was all about modern working-class London. I was sick to death of the kind of comedies I saw on telly which were based in the forties or earlier with toffs and that sort of tugging the forelock ‘Gor, bless you guv’ type of stuff which didn’t exist. Now we had a modern, vibrant, multi-racial, new slang London where a lot of working class guys had suits and a bit of dosh in their pockets and that was a very different thing.”⁷

⁶ Clark, *Only Fools and Horses, The Official Inside Story* (2011) p. 15.

⁷ Clark, *Only Fools and Horses, The Official Inside Story* (2011) p. 15.

- g. The character of Del Boy has a number of layers encompassing both humour and pathos. He is proud, vain, deluded, gaudy, ostentatious, loyal, aspires to sophistication (while never achieving it) and remaining instead caught up in scams for selling on dodgy merchandise.
 - h. He has a complex multilayered relationship with his younger brother. He is fiercely protective, quasi parental⁸, proud of his brothers' two O-levels whilst also frequently putting Rodney in his place and/or manipulating his loyalty.
 - i. The character of Del Boy was placed by John Sullivan in part out of his own personal experience⁹ is positioned in a space between two generations – that of a father and uncle who fought in the war and his much younger brother whom he regards as having been molly coddled (“the jewel in mum’s crown”) and a dreamer. By reacting to and reflecting on the generation above and below, John Sullivan wove in aspects of social commentary on what it was to be working class in London in the last two decades of the 20th century.
 - j. Some of the vocabulary and phrases created or adapted by John Sullivan for Del Boy have entered the English language in new or revived forms. Examples are “cushty” and “lovely jubbly” and “plonker” and the character itself has come to be used as a label: “He is a bit of a Del Boy”.
100. In summary, I accept that the summary of key features of the character of Del Boy provided by James Sullivan and reproduced as Annex 1 to the Particulars of Claim is (a) an accurate description of the character as revealed in the Scripts and (b) represents a highly distinctive and original character.
101. I reject Mr St Quintin’s submission that the even when taken together the features identified by the Claimant give rise to nothing more than a vague description of some general characteristics of an optimistic, sometimes dodgy market trader who uses French to appear sophisticated and makes sacrifices for his younger brother. Even if

⁸ Part of the back story was that Rodney and Del’s father had deserted them shortly after their mother passed away when Rodney was six, leaving Del to bring him up.

⁹ Clark, *Only Fools and Horses, The Official Inside Story* (2011) p. 15.

one or more ingredients of his character, if taken in isolation, might be said to be unoriginal, it is the particular combination of all the parts and aspects set out above which makes Del Boy distinctive and, it seems, gives him enduring appeal.

102. In this context, David Jason is reported to have made the following comment to Nicholas Lyndhurst and Lennard Pearce, about the importance of characters in OFAH after reading the scripts for the first series and hearing that he had been cast as Del Boy:

“I remember saying to Lennard and Nick in the bar: ‘I think we have got something really unusual here and we’re going to have to play this very differently’. They said: ‘What do you mean?’ and I said ‘Well I don’t see it as a situational comedy. It is more of a comedy drama. It isn’t just obvious jokes, its all about people and characters, there’s more to it than that’”¹⁰

103. What makes Del Boy both interesting (and funny) is the juxtaposition of the various contradictory aspects of his character. The layers of his character are revealed in events involving his brother and others which in turn appear to have resonated with the audience as a result of being set within a relatively realistic portrayal of gritty but aspirational working-class life in the pubs and clubs and tower blocks of London in the 1980s and 1990s.

104. The first Cofemel requirement is therefore, in my judgement, more than satisfied.

105. As to the second requirement, the features of Del Boy relied upon by the Claimant as constituting his character are, in my judgement, precisely and objectively discernable in the Scripts.

106. I was initially concerned that it might be impossible to separate or block out the contribution of Sir David Jason to the character, in particular, his tone of voice, facial expressions, mannerisms and physical presence from what is to be found in the Scripts. However, having at the parties’ invitation watched three episodes of OFAH (with the relevant script in hand) what was striking to me is just how much of Del Boy is in the script. This is true not only in terms of his appearance but also his character traits and relationship with the other characters.

¹⁰ Clark, Only Fools and Horses, The Official Inside Story (2011) p. 15

107. For example, Del’s interest in his own appearance, his use of mangled French and boundless optimism are all in the script on the very first page of the first episode:

“Del (studying his reflection in the mirror): S’il vous plait, s’il vous plait what an enigma. I get better looking every day. I can’t wait for tomorrow”.

Rodney: “Look at you, you have three or four changes of clothes a day”

108. The essentials of the dynamic between Rodney and Del are also defined in the text of the very first episode, appropriately titled ‘Big Brother’. It is Del’s contradictory attitude which emerges in the dialogue, by turns: caring and proud but also controlling, neglectful and mocking:

“Del: Let me remind you Rodney that you were a six year old little nipper when god smiled on Mum and made her die. Two months after that Dad packed his bags and left us to fend for ourselves. It was me that kept us together, nothing to do with grandad .. I grafted 19 – 20 hours a day to put groceries on the table – alright, it wasn’t always double legal – but you ate the finest food that was going!

Rodney: All you ever give me was TV dinners and convenience foods. If it wasn’t frozen or dehydrated we didn’t eat it. If you had been in charge of the last supper it would have been a take-away.

Del: Do you mind telling me what exactly what it is that has made your life a misery?

Rodney: Well you’ve always treated me like a child. Ain’t you? I was the only sixth former in my grammar school who wore short trousers!

Del: Yeah well I got ‘em cheap didn’t I

109. Del’s external appearance is described at various points in the Scripts for the first series:

- “Del in his usual flashy Gear” (Go West Young Man)
- “Del in a flashy evening suit, smoking a fat cigar (Cash and Curry)
- Del removes his rings, his tie-pin, his identity bracelet, his necklaces and medallions (Cash and Curry)
- Del’s wearing a navy blue three piece suit, a navy blue shirt, white tie and white shoes and a couple of gold medallions beside his obligatory gold rings, watch and chunky bracelet” (Christmas Crackers).

110. The external description develops in a consistent way in later series. In the first episode of Series 3, the opening scene is described in terms of the contrast between Del’s flash appearance and his younger brother’s scruffy look:

“Del is brushing his hair in the mirror. He wears white slacks, white loafers a brown leather bomber and all the gold. Rodney wearing his usual ‘Man from Oxfam’ clothes enters ... In the context of his trading, Del is described in the Script for another scene in the same episode as being “in his market clothes plus sunglasses and cap” (Homesick).

111. More generally, not only are the five features particular relied upon by the Claimants, as being features of Del’s character clearly present in the Scripts but the character appears fully formed in the very first series. Del’s attitudes views and approach to life, work, the law, his family, the future, his past together with his own aspirations and beliefs about himself are all objectively present and clearly identifiable from the Scripts.

112. I reject the submission made by Mr St Quintin that Del’s use of French to “convey an air of sophistication” or Del’s “eternal optimism” are nothing more subjective matters perceived nor not perceived by an audience. Whether a viewer of OFAH or a reader of the scripts approves or disapproves of Del Boy’s actions and attitudes is something which is subjective but the content and nature of his character is an objective feature which is clearly present in the Scripts themselves.

113. For all those reasons I hold that the character of Del Boy satisfies the two stage test set out in Cofemel and is therefore a work which is protected under EU Copyright law.

Pippi Longstocking

114. The conclusion I have reached by applying the two stage Cofemel test to the evidence in this case is consistent with the approach taken by the German Supreme Court in Re Pippi Longstocking [2014] E.C.C. 27, on which Mr Hill relied. Mr St Quintin is correct that this was a decision under the German Copyright Act of 1965 rather than a direct application of the Cofemel test. The question the Court had to decide was whether a character qualifies for protection as a “literary work” (‘Sprachwerk’) under Art 2(1) of the 1965 Act.

115. The German Supreme court proceeded by way of analogy with fine art:

“[21] ... In a similar way to the protection of figures in drawings in the fine arts or applied art, a literary description also can create in the mind’s eye of the reader an equally clear “picture” of a character in a book. It must be borne in mind that, with the means of language, precisely the formative character qualities of a fictitious person can be portrayed in a much more differentiated way than with the means of fine art. Consequently a detailed description of character qualities can readily compensate for a representation of the external appearance of a person which can be conveyed by means of language to only a limited extent.

[22] Copyright protection of a fictitious person may also exist independently of the specific intertwining relationships and the framework of the action as expressed in the plot of the novel. It is true that the characters in a story gain their individual characteristics usually through their actions and interactions with other persons who are depicted. However, that does not rule out the possibility that the personality expressed therein will become independent if its typical character qualities and patterns of behaviour recur regularly in different action and relationship context, particularly in the case of serialized stories.

[23] Separate protection for a fictitious character therefore depends on the creator endowing the character with an unmistakable personality by means of a combination of distinctive character qualities and particular external features. The test for that purpose must be stringent. A mere description of the external form of a character or his or her appearance will not as a rule be sufficient”

116. The Supreme Court noted the findings of the lower court in relation to Pippi Longstocking’s character, which were held to be sufficient to meet the test of being sufficiently distinctive qualities and particular external features. They were that despite losing her mother and being abandoned by her father, she was “always cheerful, very wealthy, has superhuman powers, is fearless and has absolutely no respect all of which is combined with imagination and wordplay” [25].
117. It is perhaps worth comparing this with the character features of Del Boy relied upon by the Claimant and set out in Annex 1 to the Particulars of Claim. The identified features are in my judgment at least as distinctive and fine grained as those described by the German Court of Appeal in relation to Pippi Longstocking.
118. Characters have also been held to be protected as literary works in the United States. In litigation concerning rights held by the estate of Conan Doyle, it was accepted that Sherlock Holmes and Dr Watson had copyright protection as characters: Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496, 498 (7th Cir. 2014).

Sherlock Holmes

119. The issue in Klinger was whether once some works had ceased to have copyright protection due to the passage of time but other later works remained in copyright and added new features or aspects to the characters that fact revived or extended the expired copyright in the original characters. It was held that they did not. However, on the general point of in what circumstances characters attract copyright protection in the first place, the Appeal Court said this:

“The more vague, the less ‘complete,’ a character, the less likely it is to qualify for copyright protection. An author ‘could not copyright a character described merely as an unexpectedly knowledgeable old wino,’ but could copyright ‘a character that has a specific name and a specific appearance Cogliostro¹¹’s age, obviously phony title (‘Count’), what he knows and says, his name, and his faintly Mosaic facial features combine to create a distinctive character. No more is required for a character copyright. Gaiman v. McFarlane, 360 F.3d 644, 660 (7th Cir. 2004); see also Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (L. Hand, J.).¹² From the outset of the series of Arthur Conan Doyle stories and novels that began in 1887 Holmes and Watson were distinctive characters and therefore copyrightable.”¹³:

120. The fact that both US and German law permits copyright to subsist in characters if they are sufficiently complex and distinctive is some reassurance that in accepting Mr Hill’s invitation to hold that Del Boy is a character protected by copyright I am not reaching a conclusion which is out of line with other systems of copyright law.

Literary or dramatic work?

121. I have no hesitation in holding that if Del Boy is a protectable work under EU law, he can be properly subsumed under the concept of a literary work for the purposes of the closed list of protected English works. It was not suggested that if Del Boy as a character was a work, he ought to be categorized as a dramatic work. It makes little sense to say that a character is designed to be performed in the way that a screenplay or script is intended to be performed. The conclusion that Del Boy as a character as he appears in the Scripts is a literary work does not require any strained interpretation of the CDPA. Mr St Quintin did not suggest otherwise.

¹¹ A fictional character in a comic series.

¹² “It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly”

¹³ p.13.

122. The conclusion I have reached on Issue 2.1 is that copyright subsists in Del Boy as a literary work under English law.

F. INFRINGEMENT

123. Having held that the Scripts are dramatic works and the character of Del Boy is a literary work both of which works are protected by the CDPA 1988, the next issue is whether copyright in either of these works has been infringed.
124. The Claimant's rights in either or both of these works will have been infringed if they have been copied by the Defendants. The sole alleged infringing work for the purpose of this trial is the September Script for OFDE

The legal principles

125. There following four basic principles are relevant to the question of infringement:
- a. Copying is defined as "reproducing the work in any material form": s.17(2) of CDPA. However, to amount to infringement the copying may be of the work as a whole or a "substantial part" of it: s.16(3) of CDPA.
 - b. Whether a substantial part of a work has been copied requires a qualitative rather than a quantitative assessment: Sheeran v Chokri [2022] EWHC 827 (Ch) at [21] applying Designers Guild Ltd v Russell Williams [2000] 1 WLR 2416 at p.2422 at F-H:

"Although the term "substantial part" might suggest a quantitative test, or at least the ability to identify some discrete part which, on quantitative or qualitative grounds, can be regarded as substantial, it is clear upon the authorities that neither is the correct test. Ladbroke (Football) Ltd. v. William Hill (Football) Ltd. [1964] 1 W.L.R. 273 establishes that substantiality depends upon quality rather than quantity (Lord Reid at p. 276, Lord Evershed at p. 283, Lord Hodson at p. 288, Lord Pearce at p. 293). And there are numerous authorities which show that the "part" which is regarded as substantial can be a feature or combination of features of the work, abstracted from it rather than forming a discrete part. That is what the judge found to have been copied in this case. Or to take another example, the original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original. If one asks what is

being protected in such a case, it is difficult to give any answer except that it is an idea expressed in the copyright work.”

- c. Infringement requires there to have been actual copying. This means the alleged infringer not only had access to the original work, but actually saw or heard it. It is however well recognized that neither the access nor copying needs to be direct but may be indirect: S. 16(3)(b) CPDA, *Copinger* 7-22 – 7-24.¹⁴
- d. The essential test is whether the part of the original which has alleged to have been copied contains elements which are the expression of the intellectual creation of the author of the work or not. Sheeran v Chokri [2022] EWHC 827 (Ch) at [21] applying Newspaper Licensing Agency Ltd v Meltwater Holding BV [2011] EWCA Civ 890, at [24]-[28], Mitchell v BBC [2011] EWPC 42 , per HHJ Birss QC at [28]-[29] and Infopaq International A/S v Danske Dagblades Forening [2009] E.C.D.R. 16 .

126. I remind myself that the standard two step test for copyright infringement in English law as described in the speech of Lord Millett in Designers Guild Ltd v Russell Williams [2000] 1 WLR 2416

“An action for infringement of artistic copyright ... is not concerned with the appearance of the defendant's work but with its derivation. The copyright owner does not complain that the defendant's work resembles his. His complaint is that the defendant has copied all or a substantial part of the copyright work. The reproduction may be exact or it may introduce deliberate variations—involving altered copying or colourable imitation as it is sometimes called. Even where the copying is exact the defendant may incorporate the copied features into a larger work much and perhaps most of which is original or derived from other sources. But while the copied features must be a substantial part of the copyright work, they need not form a substantial part of the defendant's work: see *Warwick Film Productions Ltd. v. Eisinger* [1969] 1 Ch. 508. Thus the overall appearance of the defendant's work may be E very different from the copyright work. But it does not follow that the defendant's work does not infringe the plaintiff's copyright.

The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work....

¹⁴ “Although there must be a causal connection between the claimant’s and the defendant’s work for there to be any infringement, this connection need not be direct. ... Even though copying may take place indirectly, it is still necessary to prove an unbroken chain between the claimant’s and the defendant’s work. It must therefore be shown that the intermediate copy is itself either a direct or an indirect copy of the copyright work”

Even at this stage, therefore, the inquiry is directed to the similarities rather than the differences. This is not to say that the differences are unimportant. They may indicate an independent source and so rebut any inference of copying. But differences in the overall appearance of the two works due to the presence of features of the defendant's work about which no complaint is made are not material.

...

Once the judge has found that the defendants' design incorporates features taken from the copyright work, the question is whether what has been taken constitutes all or a substantial part of the copyright work. This is a matter of impression, for whether the part taken is substantial must be determined by its quality rather than its quantity. It depends upon its importance to the copyright work. It does not depend upon its importance to the defendants' work, as I have already pointed out. The pirated part is considered on its own (see *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 W.L.R. 273, 293, per Lord Pearce) and its importance to the copyright work assessed. There is no need to look at the infringing work for this purpose.”

The character of Del Boy

127. Having held that the character of Del Boy is itself a protected literary work, the evidence of infringement by the Defendants is overwhelming and obvious.

128. The evidence of Ms Pollard-Mansergh and Ms Gillham was clear:
 - a. The character of Del Boy, his own back story, his relationship with the other characters in OFDE i.e. Rodney, Uncle Albert, DCI Slater, Boycie and Trigger, his use of mangled French, and the catchphrases, such as “Lovely Jubbly” and “This time next year we could be millionaires”, “a few olives short of a pizza” , his being involved in dodgy schemes as set out in the September Script were all copied from the broadcast versions of OFAH and imported into the September Script by the four mechanisms described in paragraph 47 above.
 - b. One of the aims of OFDE in general and therefor the September Script in performance was for the audience to feel that there were in the presence of a Del Boy character presented in a form which was familiar to them from OFAH and to be able to interact with him.
 - c. The brief which led from the first brain dump to the September Script was to create a “pitch-perfect” live version of Del Boy (and the other characters). That

aim is reflected in the September Script by the vocabulary and phrasing used by the Del Boy character.

129. In short, the commonality between Del Boy of the September Script and the Del Boy in the Scripts is almost total. The copying was far more than the substantial copying required for a finding of infringement.
130. There is no evidence that the actors and Ms Gillham directly used the Scripts themselves to create the Del Boy of the September Script but there is clear evidence that they watched clips from OFAH and watched entire episodes OFAH when developing the earlier iterations of the September Script. Finally, as noted at least some of the actors were superfans of OFAH with deep knowledge of the Scripts. The copying of Del Boy's character from the OFAH is, in my judgement, a clear case of indirect copying via the broadcast of the OFAH episodes.

The Scripts

131. I will assume for the purposes of the factual analysis below that I am wrong that Del Boy as a character is a work separately protected under copyright law.
132. By reference to the Schedule of Infringements (which cross refers to the witness evidence and pleadings) I find that the following features are original features of the Scripts which have been copied and used in the September Script (using the same numbering as in the Final Schedule):
- a. Item 1 (Feature 7) - The "statellite" out of range joke. This joke has two elements: Del's mispronunciation of the word satellite and his belief that his mobile phone is not working because that depends on a satellite being in range. This joke appeared in series 6 (Little Problems) of OFAH. There Del is trying to make a call using his mobile phone, which does not work, and he says "I know what's happened, the statelite has moved out of position" before saying "hang about" as another one will be along in a minute. Both elements appear in the September Script in only very slightly modified form. The core elements of the joke are exactly the same. The Defendants introduced no evidence of independent creation.

- b. Item 2 (Feature 20) - Rodney modelling outlandish gear at Del's request. It is one of the repeated themes in the Scripts that Del Boy persuades a reluctant Rodney to get into or model outlandish or unusual clothing such as underwear provided by Del. Such themes are important part of the dynamic of their relationship. One of the complaints made by Rodney is that Del Boy in Episode 1 of Series 1 is that he made him wear shorts to school even as a 15 year old. This theme appears in September Script in the form of Rodney wearing flippers, snorkel and life jacket at Del's behest, in order to assist in selling deep sea diver's watches.
- c. Item 3 (Feature 26) - The catchphrase "Oh Shut up you tart!" The Defendants admit that was created by John Sullivan and that it was derived from OFAH. The catchphrase is part of Del Boy's character. It is manifestation of Del's self confidence and his way of telling someone to stop being a moaner/whiner. It appears many times in the Scripts usually aimed at Rodney. The September Script uses it in exactly the same way.
- d. Item 5 (Feature 34) - The use of Lovely Jubbly. This is a highly distinctive phrase closely associated with Del Boy. It first appeared in Series 6 (Yuppy Love) and appears many times thereafter. I have already accepted that it was coined in this form by Mr Sullivan. The Defendants admit taking it from OFAH and incorporating it in the September Script.
- e. Item 8 (Feature 44) - Del Boy's use of (mangled) French. This is a running joke in the OFAH Scripts. It is not just that the words are misused. It reflects a part of Del Boy's character that he is aspirational and wants to *sound* impressive and sophisticated (but then gets it wrong). While it is true that the use made of "piece de resistance" in the September Script is not mangled in the context in which it appears. Nevertheless, what is copied is Del Boy's need to show off by using French. Later in the September Script French appears again and this time it is mangled: "Après moi c'est da louge"

- f. Item 9 (Feature 56) - Del's eternal optimism. This is a key character trait and is appears in many episodes. It is reflected in two specific phrases associated with Del Boy: "He who dares, wins" and "This time next year, we will be millionaires". The September Script copies the second phrase almost exactly (replacing 'will' with 'could') and the action reflects the first. Although the Defendants plead independent creation in the course of improvisation, I reject this. No proper evidence was adduced and it is in any event inherently implausible.
- g. Item 10 (Feature 57) – "splitting straight down the middle, 60/40". This is a joke which appears in the first episode of OFAH. It is admitted by the Defendants to be an original creation of John Sullivan and that it was taken from OFAH.
- h. Item 14 (Feature 85) Rodney's use of "I don't believe you": Rodney uses this phrase in OFAH to express not only incredulity but also exasperation when put in a humiliating situation by Del Boy. I accept that it is a catchphrase of Rodney which represents a key aspect of his character and his relationship with Del Boy. It is used in exactly the same way in the September Script. The denial of originality in the words by the Defendants misses the point. It is a catchphrase associated with a particular character which is copied from a copyrighted work.
- i. Item 15 – feature 89 – joke of Trigger calling Rodney 'Dave' That Trigger calls Rodney "Dave", despite Rodney repeatedly telling him he is called Rodney not Dave is a long-running joke in OFAH. It appears in the very first episode. I accept that the joke is a central feature of the relationship between Rodney and Trigger and is known to all Only Fools fans. The joke appears in identical form in the September Script. The Defendants admits that the joke was created by John Sullivan and that it was taken from OFAH. The Defendants deny that the joke is original in the sense required to create a protectable copyright work. This is, however, beside the point. It is a joke copied from a copyright work.
- j. Feature 16 - "crème de la menthe" (Feature 11). This is another instance of Feature 8. It is a malapropism of Del Boy's which appears three times in OFAH when what he means is "crème de la crème". It is used in exactly the same way

in the September Script: “You are the [chosen] ones, the crème de menthe”. The Defendants allege independent creation but produce no evidence to support this. It is inherently unlikely in any event.

133. Although the parties invested a great deal of time and energy in the Annexes and the Infringements Schedule, it is not necessary for me to make detailed findings on each and every item. In addition to the ten features discussed above I am satisfied that items 17 (Rodney being held back), 18 (Del Boy’s use of Chateaux Neuf de Pape as an exclamation of horror or surprise) 19 (Del’s use of his and Rodney’s memory to emotionally blackmail Rodney) , 21 (“Olives short of a pizza”), 22 (Rodney’s use of the catchphrase “He Who Dares”), 23 (“Cushty”) are all features which form part of the original creation of John Sullivan and which have been copied from OFAH. The same applies to the five particular features relied upon in relation to Del Boy’s character. Even if he is not protectable as a copyright work, those features of his character were, in my judgement, plainly copied from OFAH into the September Script.
134. I am more than satisfied that these features taken from the Scripts represent a substantial part of the copyright work. I have addressed the issue of infringement in accordance with the order made by HHJ Hacon (“This Issue shall be determined by reference to these Features only”). However, it seems to me that with the benefit of hindsight the schedules were something of a detail overkill. The evidence of Ms Gillham and Ms Pollard-Mansergh described above demonstrates that a conscious decision was taken to copy the names, mannerisms, catchphrases and full back stories of five of the main characters of OFAH who then all appear in one of the familiar settings of OFAH, namely the Nag’s Head in Peckham, South London. In these circumstances, it seems to me to be plain and obvious that (a) a substantial part of the Scripts was copied into the September Script and (b) that what was copied represented the expression of the intellectual creation of John Sullivan as the originator of those characters, their catchphrases and back-stories.
135. The answer to Issues 3 and 4 is therefore that there are a great number of commonalities between the September Script and the Scripts and this was result of extensive indirect copying from the Scripts via the medium of the broadcast episodes of OFAH with which the creators of the September Script were very familiar.

136. The answer to Issue 5 is that what was taken was a substantial part of the Scripts and infringed the copyright in those Scripts regardless of whether Del Boy as a character was separately protected or not.

G. FAIR DEALING UNDER SECTION 30A CDPA

137. Section 30A of the CDPA provides

(1) Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.

138. This provision was inserted into English domestic law on 1 October 2014 by Regulation 5(1) of Copyright and Rights in Performances (Quotation and Parody) Regulations 2014/2356.

139. Prior to the introduction of section 30A, English law provided that in certain circumstances works of “burlesque” parody may not be held to be an infringement of copyright. The test was whether the alleged infringer had bestowed sufficient mental labour upon what he had taken to produce an original result: Glyn v Weston Feature Film [1916] 1 Ch 261 and Carlton v Mortimer (1917-23) MacGillivray’s Copyright Cases 194 (Avory J); Joy Music v Sunday Pictorial newspapers (1920) [1960] 2 QB 60. However, in a series of cases in the 1980s a stricter test for infringement was adopted and this exception for parody in English law was all but extinguished: Schweppes v Wellington [1984] FSR 210, 212; Bently, ‘Parody and Copyright in the Common Law World’ in *Copyright and Freedom of Expression* (ALAI, 2008) p.355.

The submissions

140. Mr St Quintin made no attempt to revive the earlier English domestic law referred to above. He relied exclusively on section 30A of the CDPA.
141. The Defendants’ pleaded case was that the September Script of OFDE represented fair dealing for the purposes of parody, alternatively for the purposes of pastiche. However, in closing submissions, Mr St Quintin placed more emphasis on the OFDE being a pastiche of OFAH. He invited me to adopt the broad interpretation of the pastiche

exception advocated by Emily Hudson in her article ‘The pastiche exception in copyright law: a case of mashed-up drafting’ IPQ 2017, 4, 346-368.

142. Mr Hill submitted, in summary, as follows:

- a. It is necessary for the court to focus on the use of relevant copyright works in the Show (or substantial parts of them) and decide whether these conditions are met in respect of that use. This does not require the entirety of the Show to be a parody or pastiche, except to the extent that the relevant works are used throughout the Show (as is the case with the Characters).
- b. The uses made of John Sullivan’s works were not for the purposes of parody. They are not distinguishable from John Sullivan’s works and that was the Ds’ intent. They did not want people coming away thinking they were getting something different. The aim was to recreate his work in a dining context.
- c. The use made by the Defendants did lead to a humorous product but that was because the subject matter taken was itself humorous. Imitation is not parody.
- d. Pastiche is limited to copying style (but not subject matter) or the amalgamating of a number of different works from different authors.
- e. Hudson’s approach essentially treats pastiche as meaning nothing more than imitation – i.e. copying. That would be in essence a general fair use defence, which is neither permissible under the 3 step test nor was intended by using the word ‘pastiche’ in the context of ‘parody’ and ‘caricature’ – three comparable types of limited use that might benefit from the optional exception are listed.
- f. If wrong on the above points, the use made by the Defendants did not constitute fair dealing and did not satisfy the three step test.

The Information Society Directive

143. Section 30A has its origins in an EU Directive: Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society (**‘the Info Soc Directive’**).

144. Article 5(3)(k) of the Info Soc Directive provides:

“Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(k) use for the purpose of caricature, parody or pastiche;”

145. Article 5(5) of the Info Soc Directive provides:

“The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”

The three step test

146. Article 5(5) corresponds to what is usually referred to as “The three step test”. This first appeared in Art.9(2) of The International Convention for the Protection of Literary and Artistic works signed at Berne on 9 September 1886 (as amended in 1979) (**‘the Berne Convention’**). Article 9 (2) is an article which allows state parties to permit reproduction of protected works. It has to be read in the context of the Article 9 (1) which establishes the basic rights of authors. Art 9 as a whole reads:

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such [i.e. literary and artistic] works in certain special cases, provided such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

147. The three step test also appears in Article 13 of The Agreement on Trade-related Aspects of Intellectual Property Rights (**‘TRIPS’**) which forms Annex 1C to the Agreement establishing the World Trade Organisation signed in Morocco on 15 April

1994 and Article 10(2) of The World Intellectual Property Organisation Copyright Treaty agreed in Geneva on 20 December 1996 ('**WIPO**').

148. The UK and all the Member States of the European Union are parties to the Berne Convention, TRIPS and WIPO.
149. I was referred by Mr Hill to the following comments of Arnold J. about the three step test in England and Wales Board Limited v Tixdaq Limited [2016] EWHC 575 (Ch) at [90] – [92]:

[90]. The first step is that the exception must be confined to "certain special cases". It is not necessary to elaborate upon this requirement, since I understand it to be common ground that reporting current events is a certain special case.

[91]. The second step is that the application of the exception must not "conflict with a normal exploitation of the work or other subject-matter". It is clear that this refers to exploitation of the work by the copyright owner, whether directly or through licensees. In my view it requires consideration of potential future ways in which the copyright owner may extract value from the work as well as the ways in which the copyright owner currently does so. On the other hand, it also embraces normative considerations i.e. the extent to which the copyright owner should be able to control exploitation of the kind in question having regard to countervailing interests such as freedom of speech.

[92] The third step is that the application of the exception must not "unreasonably prejudice the legitimate interests of the rightholder". Although this is often treated as a separate and additional requirement to the second step, it has also been forcefully argued that it qualifies the second step. In other words, it indicates that it is not sufficient for an exception not to apply that there is some conflict with the copyright owner's legitimate interests, including the copyright owner's normal exploitation of the work. Rather, the exception can apply unless those interests are unreasonably prejudiced. This requires consideration of proportionality, and a balance to be struck between the copyright owners' legitimate interests and the countervailing interests served by the exception. That approach appears to be consistent with the jurisprudence of the CJEU discussed above, and therefore I shall adopt it.

The reference to "jurisprudence" in paragraph 92 is a reference back to paragraph 73 in the Judgement. There Arnold J refers to Painer v Standard VerlagsGmbH [2011] ECR I-1253 at [134] and Deckmyn v Vandersteen C-201/13 at [27] as authority for the proposition that Article 5(3)(c) of the Info Soc Directive must be applied "to strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive and, on the other, the freedom of expression of the user of a protected work who is relying on the exception".

150. In the present case neither counsel sought to persuade me that Arnold J.'s description of the three steps test was anything other than accurate. I accept that it is. Like him I was not referred to the WTO Panel Report in the case of WT/DS160/R of 15 June 2000: United States—s.110(5) of the Copyright Act. Mr St Quintin did, however, refer me to the summary of the decision contained in *Copinger* at 23-139. In doing so he placed emphasis on the words underlined below:

The Application of the three-step test by a WTO Panel

23-139 Of particular interest in connection with limitations under the TRIPs Agreement, is the application of the “three-step test” of the Berne Convention by a World Trade Organisation Panel in its report on a complaint brought against the USA by the EU under the TRIPs dispute prevention and settlement procedure. This report would appear to be the first judicial interpretation of the three-step test. The panel found that the term “special cases” in the first condition requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. However, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. Thus, the first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute (as had been argued by the EU). As regards the second condition, that an exception should not conflict with the normal exploitation of a work, the panel considered that a conflict arises when the exception or limitation enters into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e. the copyright) and thereby deprives them of significant or tangible commercial gain. The panel finally gave its opinion on the third condition of the three-step test, that the exception or limitation must not unreasonably prejudice the legitimate interests of the right holder, finding that there is unreasonable prejudice where an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright holder.

151. This passage is consistent with the summary of the three-stage test provided by Arnold J. in England and Wales Board Limited v Tixdaq Limited [2016] EWHC 575 (Ch).

Fair dealing

152. As noted by Arnold J in England and Wales Board Limited v Tixdaq Limited [2016] EWHC 575 (Ch) at [83] the question of what is meant by “fair dealing” was (albeit in a different context) considered by the Court of Appeal in Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142, [2002] Ch 149. At [70]. The following passage from Laddie, Prescott & Vitoria, *The Modern Law of Copyright and Designs* (3rd edition, 2000) was approved by Lord Phillips:

"It is impossible to lay down any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression. However, by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on. The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However, this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate public controversy to make use of 'leaked' information. The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing."

153. Mr Hill referred me to the following passage from *Copinger* on the relationship between section 30A and the three step test:

“Probably, in order to come within an exception, the act in question must not only satisfy the terms of the exception but must also conform to the three-step test laid down in Art.5(5) of the Directive.”

154. This passage is based on the decision of the CJEU in Stichting Brein v Wullems C-527/15 in which the CJEU held that the temporary reproduction in that case did not fall within the temporary copying exception in Article 5(1) of the Info Soc Directive because the three step test was not met. Article 5(5) was in other words applied directly to the facts of the case.
155. However, as noted by Arnold J. in England and Wales Board Limited v Tixdaq Limited [2016] EWHC 575 (Ch) at [72], there are other cases suggesting that the three step test is directed exclusively to Member States rather than national courts. It is not necessary for me to decide this point because it was agreed by counsel that (a) it was appropriate to apply the three step test and that (b) the factors overlapped to a very large extent with those relevant to whether or not the reproduction in question amounts to fair dealing or not within the meaning of section 30A.

“For the purpose of”

156. Section 30A requires that in order to a permitted use the fair dealing must be “for the purpose of” parody, pastiche or caricature. It was not suggested that this phrase in section 30A has any different meaning to the same words that in section 30(2) CPDA (“for the purpose of reporting current events”).
157. In England and Wales Board Limited v Tixdaq Limited [2016] EWHC 575 (Ch) Arnold J noted the observations of the Court of Appeal in Pro Sieben media AG v Carlton UK Television Ltd [1999] 1 WLR 605 at 614

"In Sweet v. Parsley [1970] AC 132 the House of Lords emphasised the importance of construing a composite phrase rather than a single word. It seems to me that in the composite phrases 'for the purposes of criticism or review' and 'for the purpose of reporting current events' the mental element on the part of the user is of little more importance than in such everyday composite expressions as 'for the purpose of argument' or 'for the purpose of comparison.' The words 'in the context of' or 'as part of an exercise in' could be substituted for 'for the purpose of' without any significant alteration of meaning.

That is not to say that the intentions and motives of the user of another's copyright material are not highly relevant for the purposes of the defences available under section 30(1) and section 30(2). But they are most highly relevant on the issue of fair dealing, so far as it can be treated as a discrete issue from the statutory purpose (arguably the better course is to take the first 24 words of section 30(1), and the first 16 words of section 30(2), as a single composite whole and to resist any attempt at further dissection). It is not necessary for the court to put itself in the shoes of the infringer of the copyright in order to decide whether the offending piece was published 'for the purposes of criticism or review.' This court should not in my view give any encouragement to the notion that all that is required is for the user to have the sincere belief, however misguided, that he or she is criticising a work or reporting current affairs. To do so would provide an undesirable incentive for journalists, for whom facts should be sacred, to give implausible evidence as to their intentions."

158. Arnold J added that the question of whether the use of copyright material for is “for the purpose of” reporting current events is to be judged objectively. The same in my judgment applies in the context of section 30A. Nevertheless, in this context it is in my judgment legitimate to have regard to the motives of the user: England and Wales Board Limited v Tixdaq Limited [2016] EWHC 575 (Ch) at [85].

IPO Guidance

159. Shortly after section 30A came into force, the Intellectual Property Office published some guidance (UKIPO 2014) 6 in which they said the following question and answer guidance:

What's changing?

Many works of caricature, parody or pastiche – songs, films, artworks and so on - especially in this age of digital creation and re-mixing, involve some level of copying from another work. The law is changing to allow people to use limited amounts of another's material without the owner's permission. For example: a comedian may use a few lines from a film or song for a parody sketch; a cartoonist may reference a well known artwork or illustration for a caricature; an artist may use small fragments from a range of films to compose a larger pastiche artwork. It is important to understand, however, that this change in the law only permits use for the purposes of caricature, parody, or pastiche to the extent that it is "fair dealing." Fair dealing allows you only to make use of a limited, moderate amount of someone else's work. This legal term is further explained later in this guide.

What is meant by "for the purpose of caricature, parody or pastiche"?

The words "caricature, parody or pastiche" have their usual meaning in everyday language, but also take account of the context and purpose of the copyright exceptions. In broad terms: parody imitates a work for humorous or satirical effect. It evokes an existing work while being noticeably different from it. Pastiche is musical or other composition made up of selections from various sources or one that imitates the style of another artist or period. A caricature portrays its subject in a simplified or exaggerated way, which may be insulting or complimentary and may serve a political purpose or be solely for entertainment.

Does the parody have to be making fun of the original work or its author?

Whilst parody does involve an expression of humour or mockery, it does not have to comment on the original work or its author. It can be used to comment on any theme or target.

Parody

160. Parody is a well-known literary genre. Familiar examples may be found in *The Oxford Book of Parodies* (2010) and *The Faber Book of Parodies* (1984). The editor of the former, John Gross, says this in the Introduction:

"A parody is an imitation which exaggerates the characteristics of a work or style for comic effect. Such is the broad definition on which most dictionaries or reference books agree".

The modern-day parodist, Craig Brown, who has written a parodic diary in *Private Eye* for many years has referred to parody in literature as a pas-deux in that "the parodist

must inhabit the language and speech-rhythms of the parodied while subverting them for his own ends”: *The Lost Diaries* (2010).

161. The Shorter Oxford English defines parody as:

“A n. 1. prose, verse or (occas.) artistic composition in which the characteristic themes and style of a particular work, author, etc., are exaggerated or applied to an inappropriate subject, esp. for the purposes of ridicule... 2. Fig. A poor or feeble imitation, a travesty M19.

B. v 1. V.t. Compose a parody of; be a parody of M18. B v.i. Parody a composition rare L19 2. V.t. fig. imitate in a poor or feeble manner, travesty”

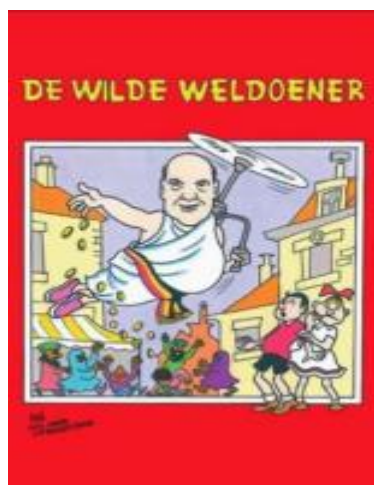
Deckmyn

162. Parody as a legal concept in the context of Article 5(3)(k) of the Info Soc Directive has been considered by the CJEU in Deckmyn v Vandersteen C-201/13 [2014] Bus L.R. 1368. The case concerned the use made by a Mr Deckmyn of a drawing which closely resembled the title cover of a comic book from 1961. Mr Deckmyn was a member of a Belgian nationalist anti-immigration party. Mr Vandersteen’s estate held the copyright in the image and objected to the use of the image for political purposes.

163. The title cover of the original comic book shows one of the main characters wearing a white tunic and throwing coins to people who are trying to pick them up under the title “The Wild Benefactor”:



164. In the allegedly infringing work (the cover of a calendar), the flying main character was replaced by the Mayor of the City of Ghent and inserted into the background people wearing veils picking up the coins:



165. The Belgian court of first instance ordered Mr Deckmyn to cease using the drawing. On appeal, Mr Deckmyn argued that the political cartoon fell within the parody exemption provided under Belgian law. The copyright holders argued that the parody exemption did not apply because it failed to meet certain criteria, including that it
- a. Failed to fulfil a critical purpose;
 - b. Lacked originality;
 - c. Failed to display humorous traits;
 - d. Failed to try to ridicule the original work;
 - e. It borrowed a greater number of formal elements from the original work than was strictly necessary in order to produce the parody.
 - f. The drawing conveyed a discriminatory message, since the characters who, in the original work, pick up the scattered coins, were replaced in the drawing at issue by people wearing veils and people of colour.

166. The Court of Appeal in Brussels referred the following questions to the CJEU:

“1. Is the concept of ‘parody’ an autonomous concept of EU law?

“2. If so, must a parody satisfy the following conditions or conform to the following characteristics: —display an original character of its own (originality); —display that character in such a manner that the parody cannot

reasonably be ascribed to the author of the original work; —seek to be humorous or to mock, regardless of whether any criticism thereby expressed applies to the original work or to something or someone else;—mention the source of the parodied work?

“3. Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a parody?”

167. The CJEU held in answer to those questions:

1. The concept of “parody” appearing in that provision is an autonomous concept of EU law.
2. The essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery.
3. The concept of “parody”, within the meaning of that provision, is not subject to any of the following conditions mentioned by the referring court:
 - a. that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work;
 - b. that it could reasonably be attributed to a person other than the author of the original work itself;
 - c. that it should relate to the original work itself or mention the source of the parodied work.
4. When applying the exception for parody, within the meaning of article 5(3)(k) of Directive 2001/29 , a court must strike a fair balance between, on the one hand, the interests and rights of persons referred to in articles 2 and 3 of that Directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of article 5(3)(k)
5. It is for the national court to determine, in the light of all the circumstances of the case in the main proceedings, whether the application of the exception for parody, within the meaning of article 5(3)(k) of Directive 2001/29 , on the assumption that the drawing at issue fulfils the essential requirements of parody, preserves that fair balance.

168. There is no record of what happened to the case when it returned to the referring court.

Two types of parody

169. The Advocate General in his opinion at [61] distinguished between two types of parody, namely:

(i) Parody directed at or concerned with the original work (*'parody of'*)

(ii) Parody or target parody where the original work parodied is merely the instrument of an intention aimed at a third-party individual or object (*'parody with'*).

The second type of parody is sometimes called 'target parody'.

170. The same distinction as referred to by the Advocate General is contained in the UK IPO Guidance referred to above and it is clear from the judgment of the Grand Chamber that both types of parody are encompassed within Article 5(3)(k) of the Inf Soc Directive.

171. The reason why both types of parody are given protected status is that they involve freedom of expression in a context where the copyright holder may well be highly unlikely to grant a licence. Parodies of and target parodies may be a form of artistic expression but target parodies may additionally involve considerations of freedom of political expression. The alleged parody in Deckmyn was a target parody. Mr Deckmyn was not passing comment on or making fun of the main character from the Suske en Wiske comic or the comic series more generally. The altered image was a mere vehicle for a political message.

172. The essential elements of parody as a legal concept identified by the CJEU, the are that the work must

(i) evoke an existing work

(ii) be noticeably different from that existing work

(iii) constitute an expression of humour or mockery

173. It has been pointed out that this definition is potentially very wide especially when applied to alleged copies of humorous works:

“Some activities covered by the Deckmyn definition could not, in any generally accepted sense, be regarded as parodies. Consider, for example, the adaptation of a work which simply “borrows” humour from the underlying work - an adapted image of a comic cartoon character or an unlicensed sequel to a funny novel, for example. On the face of it, in both situations, the conditions of the Deckmyn definition would be satisfied. However, neither could reasonably be described as parody.”

(Griffiths, “Fair Dealing after Deckmyn’ – the United Kingdom’s defence for caricature, parody or pastiche” in Richardson and Rickeson, *Research Handbook on Intellectual Property in Media and Entertainment*, (Edward Elgar, 2017))

174. I agree. The author continues:

“The Advocate General convincingly explained that parodies do not have to “target” an underlying copyright work and that contemporary cultural practice encompasses parodies which adapt works in order to comment on social practices and behaviour beyond the boundaries of the underlying work (so-called “weapon parodies”). However, a parody must target something.¹⁵ It must be a “weapon” of some sort. The two hypothetical examples described above are not parodies because they are not directed at anything at all.”

175. I agree. Another way of putting that the parody must have a target is to say that there must be some critical distance between the new work and the original work:

“Although parody and imitation are close, what distinguishes them is that parody focuses on criticizing or mocking the original whereas imitation merely pays tribute to the original work, thereby lacking the critical distance which is so important to in a work of parody”¹⁶

176. I therefore accept the submission by Mr Hill that it is an essential part of parody within the meaning of the Info Soc Directive and section 30A of the CDPA that:

“it does express some kind of opinion by means of its imitation, but noticeable difference, from the work parodied”

The opinion might be about something outside of the work such as a political figure or policy of a public authority (as in the Deckmyn case itself) or it might be an opinion about the parodied work itself. But either way it is this way that the work of parody

¹⁵ The editor of *The Oxford Book of Parodies* says “A parody is no longer worthy of the name, however, if it loses sight of its target”. Introduction p. xiii

¹⁶ Jacques, *The Parody Exception in Copyright Law* (Oxford, 2019) p.11.

“constitutes” an expression of mockery or humour in the way demanded by the Judgment of the CJEU.

177. The need for a parody to express an opinion in order to fall within the exception is particularly important in the case of parodies of comedies. It is relatively unusual for parodies to take comic works as a subject. It is common in literary and dramatic parody for serious works to be mocked and made fun of : see e.g. Craig Brown’s parody of a description of an imagined trip to the sea side by WG Sebald¹⁷ and Benny Hill’s parody of Edward Albee’s ‘*Whose Afraid of Virginia Woolf*’.¹⁸ The parody by Mel Jones and Griff Rhys Jones of the Two Ronnies (‘*The Two Ninnies*’¹⁹) is a rare exception to the general rule that comedies are not usually the subject of parody.²⁰ The Two Ninnies sketch is both funny impersonation and is also at the same critical of the comic technique used by Ronnie Barker and Ronnie Corbet. In that sense it ‘targets’ the comedy of the Two Ronnies. It is both a parody of and parody with.
178. Without this critical target element every reproduction or imitation of a comic work (as long as it was noticeably different from the original) would constitute a parody. That cannot be what the CJEU intended.
179. Mr Hill’s submission is in my judgment supported by the observation of the Advocate General in Pelham v Hutter C-476/17):

“As I have already stated, EU copyright law takes account of various rights and interests which could conflict with the exclusive rights of authors and other rightholders, in particular the freedom of the arts. Exceptions to the exclusive rights such as the quotation, and caricature, parody and pastiche exceptions facilitate dialogue and artistic confrontation through references to pre-existing works”

180. Works of parody can only facilitate dialogue or give rise to artistic confrontation if they are in some sense themselves constitute an expression of opinion expressed as humour or mockery. I accept Mr Hill’s submission that mere imitation (of a work of comedy) is not enough to constitute parody.

¹⁷ “High above me in the air, the seagull continued upon its vacuous and erratic journey through a sky still glowering in fury at the ceaseless intrusion of the crazed sun”.

¹⁸ <https://www.youtube.com/watch?v=iVb5EBSNKTW>

¹⁹ https://www.youtube.com/watch?v=6oVG4_k7Hbc

²⁰ Another example is the comedian John Thompson who, as Bernard Righton, critically parodies the comedian Bernard Manning: <https://www.youtube.com/watch?v=BxFqv1QDI3Q>

Pastiche

181. Pastiche is defined in the Shorter Oxford English Dictionary as:

A n. A medley of various things: spec (a) a picture or a musical composition made up of pieces derived from or imitating various sources (b) a literary or other work of art composed in the style of a well-known author, artist etc. L19. B. v.t. & i. Copy or imitate the style of an artist or author”

182. In his opinion the AG in Pelham v Hutter said (in a footnote, n.31):

“As for the concept of pastiche, it consists in the imitation of the style of a work or an author without necessarily taking any elements of that work. However, the present case concerns the reverse situation whereby a phonogram is taken to create a work in a completely different style.”

183. In the article relied upon by Mr St Quintin, Emily Hudson notes that the term "pastiche" is used less frequently in the English language than both parody and caricature. She notes that some musicologists draw a distinction between pastiche and pasticcio, with the former referring to works that deliberately imitate the style of another, and pasticcio to operas and other performances drawing from the works of different composers. She refers to Richard Dyer who has argued that the primary definition of pastiche is "a kind of imitation that you are meant to know is an imitation".

184. She comments that there appears to be a consensus that pastiche and parody can be contrasted owing to intention and impact. For instance, it has been said that while pastiche "borrows closely, openly, appreciatively, and often playfully from the styles of previous works, frequently combining elements of different styles", the imitation present in parody is one "in a spirit of mockery or ridicule". That is consistent with the approach of the CJEU in Deckmyn set out above.

185. She notes the suggested definition offered by the IPO for pastiche in the context of section 3A of CDPA was the use of "small fragments from a range of films to compose a larger pastiche artwork". Hudson concludes that: “the ordinary meanings of pastiche suggest that it exhibits features that are distinct from, and operate well outside of, the genres of parody and caricature.”. I agree.

186. She concludes that it is appropriate to start with the ordinary meaning of pastiche, which as discussed in the second section covers imitation of the style of pre-existing works, the incorporation of parts of earlier works into new works, and the production of medleys. She continues:

“Returning to s.30A, the copyright definition of pastiche should reflect the term’s essential meaning, which covers two key activities: imitation of the style of pre-existing works, and the utilisation or assemblage of pre-existing works in new works.”

187. I agree. This approach seems to me to be consistent with the approach of the CJEU to parody in *Deckmyn* which involved starting with the meaning of the term in ordinary language and identifying its essential ingredients, the comments of the AG in *Pelham v Hutter* cited above and the Guidance published by the IPO in its Guidance.

188. It follows that the two essential ingredients for pastiche within the meaning of s30A are, in my judgment, that:

- a. The use imitates the style of another work; or
- b. It is an assemblage (medley) of a number of pre-existing works.
- c. In both cases, as with parody, the product must be noticeably different from the original work.

189. If this definition is adopted, pastiche in s.30A could, according to Hudson, potentially apply to a broad spectrum of ‘mash-ups’, fan fiction, music sampling, collage, appropriation art, medleys, and many other forms of homage and compilation. This may be so. Each case will have to be assessed on its own merits. However, it is important to bear in mind that s.30A must be read in light of the first of the three-step tests. If pastiche is too widely interpreted, to cover any imitation or reproduction of subject matter it ceases to be a “special case” of protected expression. It would encompass virtually any form of borrowing, imitation or reproduction. This was plainly not the intention of the European or UK legislature which created an exception for three limited specific types of use.

190. If pastiche is interpreted too broadly so that it in effect encompasses all forms of appropriation and imitation, it would also mean that s.30A would become a general fair use provision which is not what either the Info Soc Directive or section 30A intends. I therefore accept Mr Hill's submission that the pastiche exception must be confined to use which involves the copying of style of a work (or the creation of amalgamation of works in the form of medley).
191. There may of course be cases where the allegedly infringing work may contain elements of both parody and pastiche or even parody, pastiche and caricature. That is not the case here so the issue does not arise but it seems to me that section 30A is flexible enough to accommodate such a case in any event. I don't see any difficulty in reading the test as being whether there has been 'fair dealing for the purposes of parody [and/or] pastiche [and/or] caricature [or any combination or mixture of these three]'
192. I should add that although the list of issues for trial divides the section 30A into two elements, namely 'whether the acts of infringement are for the purpose of parody or pastiche' and 'do the acts amount to fair dealing with the Claimant's works', it seems to me that s.30A actually contains only one question which is whether the acts complained of amount to fair dealing for the purposes of parody or caricature or pastiche'.
193. I also accept Mr Hill's submission that the court's focus ought to be on the use which is made of the relevant copyright works in OFDE Show / the September Script. The court is not required to assess whether the OFDE is itself a work of parody or pastiche.

H. APPLICATION TO THE FACTS OF THIS CASE

No use for the purpose parody

194. In my judgement, the use made of the characters, their backstories, jokes and catchphrases is not for the purpose of parody within the meaning of section 30A for the following reasons:
- a. The September Script does not evoke OFAH in order to express humour about OFAH or anything else. In so far as the Script is humorous, the humour is already contained in the borrowed material.

- b. The September Script does not evoke OFAH in order to mock it or critically engage with either OFAH or situation comedy or anything else.
- c. OFDE involves the wholesale transposition of the characters, language, jokes and backstories from OFAH into the setting of an imaginary pub quiz. It is closer in form to reproduction by adaptation than parody.
- d. Although some of the characters may have appeared in OFDE in a slightly exaggerated fashion, this is not evident from the September Script and was not intended. The overall aim of the September Script was rather to represent the characters taken from OFAH in a pitch perfect familiar fashion.
- e. Whilst the form of the September Script is noticeably different from the OFAH Script in that it is set in a live and interactive dining experience rather than being intended to be performed before a passive live audience, it does not seek to target OFAH or use OFAH either to express humour about it or mock it (or anything else).
- f. None of the marketing material or planning of the show or reviews of OFDE refers to any use of material from OFAH for the purpose of parody.
- g. The overwhelming audience feedback was that it felt like being in another live episode of the OFAH. In that respect the September Script is not noticeably different from OFAH. It is a reproduction by adaptation to a live dining setting:
 - i. As the show's website states "it's a hoot ... like being in the telly".
 - ii. "Great night out... It was like being sat in the middle of an episode"
 - iii. "From start to finish it felt like we were in an episode of 'Only Fools'".

No use for the purpose of pastiche

195. In my judgement, the use made of the characters, their backstories, jokes and catchphrases is not for the purpose of pastiche within the meaning of section 30A for the following reasons:
- a. The September Script does not use elements from the Scripts to imitate the style of OFAH. Nor are the elements taken arranged in any sort of medley or

assemblage. Rather it takes the characters, with their full back story and catch phrases and simply (re)presents them in a live dining format.

- b. The use made of Del Boy and the other characters, their language, jokes and backstories from OFAH in the setting of an imaginary pub quiz involves a wholesale borrowing of content. It is close to reproduction by adaptation than pastiche.
- c. None of the marketing material or internal planning material refers to the OFDE Show as being intended as being a pastiche of OFAH.
- d. None of the reviews of the OFDE Show refer to it as being perceived or understood to be a pastiche.
- e. The September Script uses copyright material from OFAH to create an interactive adaptation of OFAH with the aim of giving the audience the feeling that they are meeting the characters from OFAH. The loose script built around the borrowed characters and backstories is a mere vehicle for facilitation this feeling of coming into contact with the characters from OFAH rather than being an attempt to use the style of OFAH. In that respect the September Script is not noticeably different from OFAH.

No fair dealing

196. Assuming that I am wrong and the September Script does involve the use of copyright material for the purposes of pastiche or parody, in my judgment, that use does not qualify as fair dealing and fails the steps 2 and 3 of the three step test for the following reasons:

- a. The taking from the Scripts is very extensive both in terms of the quantity of material and its quality:
 - i. As to the extent of the taking, all the characters used in the September Script are lifted wholesale without any attempt to rework or rename them.

- ii. This taking includes the characters' full back stories, appearance, wants desires, frustrations, social context. It took the key moments, the key catchphrases, and most recognizable parts of OFAH and the characters were closely reproduced in what was intended to be pitch perfect manner. The effect is that the audience feels they have just lived an episode.
 - iii. As the Break a Leggers' video review put it: "It didn't try to add anything particularly new or inventive but why would you when you've got great source material with strong characters, with memorable lines and catchphrases, why would you feel the need"
 - b. The use made of the Scripts is not a type of expression which attracts particular protection or engages fundamental rights. There is no expression of political view or any attempt to engage in an artistic dialogue or aesthetic criticism of OFAH specifically or through that show about comedy or television or popular culture generally.
 - c. The aim was of putting on the show was simply to entertain the audience by bringing them into contact with the copied characters.
 - d. OFDE plainly competes with Shazam's normal exploitation of OFAH:
 - i. Whilst the most common exploitation of the works in issue is via television broadcast, that is not its only form of exploitation. Through its licensing agreement with the BBC, Shazam had a long established and on-going commercial interest in exploiting OFAH. It had been involved in a prequel and a sequel to OFAH and received license fees for a wide range of OFAH themed promotional items.
 - ii. Shazam had also invested large sums in a musical adaptation of OFAH. OFDE represented an adaption of OFAH in an interactive dining show.
 - iii. ITI's aim was to extract value from the use of the OFAH characters in the form of a commercial enterprise of a live dining live show. I reject the submission that unless the OFDE can be shown to interfere with

the sale of books containing the Scripts, there is no commercial interference with Shazam's normal exploitation of OFAH. Shazam's normal exploitation of the Works took many forms. It is irrelevant in this context that Shazam has not considered itself commissioning or presenting a dining show of the OFAH.

- iv. OFDE was launched and marketed at the same time as a the fully authorized OFAH Musical was going through the same process. There was a significant risk that some people interested in seeing a live OFAH themed performance might go to see the OFDE rather than go to the Musical. It is not necessary for Shazam to show actual diversion of trade because of the existence of OFDE. A risk of diversion is sufficient to give rise to a potential conflict with Shazam's normal exploitation of the Works and Shazam's economic interest in the Works.

- e. I accept Mr Hill's submission that OFDE amounted in substance to the creation of a new episode of OFAH adapted for a dining performance. It is obvious that what amounts to the writing of a new episode of an established and commercially successful work using the same principal characters, back story, catchphrases and social and temporal setting without permission unreasonably prejudices the legitimate interests of Shazam.
- f. Shazam had a legitimate interest in controlling how the OFAH characters were portrayed and presented and commercially exploited. The conflict with Shaza's legitimate commercial interests in these circumstances was stark.
- g. The presentation of the characters, catchphrases, backstories from OFAH (unchanged) in a live setting for the purpose of entertainment is a form of exploitation which a copyright holder would legitimately expect to be able to control (e.g. by licence).

I. PASSING OFF

197. The parties' submissions on passing off were short and the time devoted to it at trial was limited. I will accordingly state my conclusions briefly.

The legal principles

198. There was no dispute between the parties as to the applicable law. It may be summarized as follows:

- a. Passing off requires proof of the so-called classical trinity of (i) goodwill, (ii) misrepresentation leading to deception or a likelihood of deception and (iii) damage: see Reckitt & Colman Products Ltd v Borden Inc (No.3) [1990] 1 W.L.R. 491.
- b. The burden in relation to all three elements is on the Claimant.
- c. The date at which these elements must be proven is the date upon which the acts alleged to amount to passing off commenced: see Lord Neuberger PSC at [16] of Starbucks (HK) v British Sky Broadcasting Group [2015] UKSC 31.
- d. In relation to deception:
 - i. The court must assess whether "a substantial number" of the Claimants' customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per Interflora Inc v Marks and Spencer Plc [2012] EWCA Civ 1501, [2013] FSR 21).
 - ii. In Harrods Ltd v Harrodian School Ltd [1996] RPC 697 at p.706, Millett LJ said:

“Deception is the gist of the tort of passing off, but it is not necessary for a plaintiff to establish that the defendant consciously intended to deceive the public if that is the probable result of his conduct. Nevertheless, the question why the defendant chose to adopt a particular name or get up is always highly relevant. It is "a question which falls to be asked and answered": see Sodastream Ltd. v. Thorn Cascade Co. Ltd. [1982] R.P.C. 459 at page 466 per Kerr L.J. If it is shown that the defendant deliberately sought to take the benefit of the plaintiff's goodwill for himself, the court will not "be astute to say that he cannot succeed in doing that which he is straining every nerve to do": see Slazenger & Sons v. Feltham & Co. (1889) 6 R.P.C. 531 at page 538 per Lindley L.J.”

- e. The same approach applies in in cases involving goodwill based in whole or in part on character merchandising, as long as the specific type of misrepresentation that is relevant to those cases is borne in mind: see Fenty v Arcadia [2015] EWCA Civ 3 at [39], following Laddie J in [46] of Irvine v Talksport [2002] EWHC 367 (Ch).
 - f. Proof of actual damage is not required.
199. To these basic propositions, Mr Hill adds the following gloss to proposition (d) above: Where a valuable commercial creative property has been created, it can certainly be the case that a substantial portion of the public will believe that those using key features of that property is put out by the owner of the property or someone authorised by them: see, e.g. IPC Magazines v Black and White Music [1983] FSR 348 at 350.

Goodwill

200. I accept the Claimant's case that significant goodwill has been built up by the Claimant attaching to at least both of the following indicia ('**the Indicia**') (i) the name Only Fools and Horses ('**the Name**') and (ii) the leading characters, in particular, Del Boy. It was built up prior to and was well established by 2009 and continued to exist at all material times thereafter.
201. The evidence which clearly establishes goodwill is, in my judgement, as follows:
- a. The fact that OFAH was broadcast to huge audiences over many years and great popular and critical acclaim in the UK.
 - b. The substantial sums earned from OFAH in the form of royalties since 1981.
 - c. Substantial sales of OFFAH-themed merchandise, the proceeds of which were split between the BBC and Mr Sullivan and subsequently between the BBC and Shazam.
 - d. The licensing of the intellectual property rights in the works in the form of merchandising licences, format right licence(s) and the licence in respect of the Musical.
202. It is, in my judgement, irrelevant that the BBC owned trade marks in respect of OFAH. Ownership of goodwill and trade marks is divided up between persons in many

contexts. I am satisfied that Shazam (and prior to that Mr Sullivan) was ultimate source of the business represented by the Indicia and has been conducting business using them.

203. It is equally irrelevant that merchandising in relation to OFAH is carried out in practice by the BBC (pursuant to the terms of the Merchandising Agreement). The notice on the BBC merchandising website says in terms that copyright in the “scripts and characters” is owned by Shazam. In other words, as Mr Hill, submits the BBC puts merchandise out into the market under its own mark but with the permission of Shazam.

Misrepresentation

204. In relation to misrepresentation the issues were narrow.
205. The only issue addressed by the parties in their submission was whether it was likely that some people at least will be deceived into the OFDE Show to be authorised by Shazam. This divided into two sub-issues:
- a. Is the name of the show sufficiently different to OFAH that no confusion will have occurred?
 - b. Is the nature of the OFDE so removed from the Sitcom that people are unlikely to associate the two?
206. In my judgement, the name of OFDE was liable to confuse and mislead. OFAH was as I have found often abbreviated to “Only Fools” including by John Sullivan himself. The use of (Cushty) in the title was also, in my judgement, bound to cause a significant number of people seeing it to think that OFDE was a spin-off of OFAH because of the close association between that word and OFAH and Del Boy in particular. The fact that ITI considered it necessary to include a disclaimer on its website (albeit only on the terms and conditions page) shows that ITI were aware of the potential for confusion. However, I accept Mr Hill’s submission that most users of the website would not have made it through to this page and so would not have seen the disclaimer. If the disclaimer had been more prominent or the title of the show had made it clear that it was unofficial tribute show, then the misrepresentation could have been avoided.
207. I do not accept that the nature of OFDE was so removed from OFAH as to make it obvious that it was not associated with OFAH. The similarity in the dress and appearance of the characters in the publicity material for OFDE, the use of the only

fools domain name were in my judgment such that it was likely to cause causal observers to consider that the OFDE show was officially authorised and associated with OFAH. Ms Gillham accepted this much in cross examination. It is not necessary for the Claimant to show that anyone had actually complained of being misled.

208. I also accept Mr Hill's submission that OFDE was as a show was no more or no less removed from OFAH than the Musical was. Both had the same principal characters, with their full backstories and distinctive catchphrases, albeit the shows had different settings and formats. I consider that most members of the public, knowing that the TV series had long since ended, would be equally likely to consider that both were authorised spin offs.

Damage

209. I consider that it is likely that some fans of OFAH would be diverted from purchasing tickets for the Musical by the existence of OFDE. There are of course differences between the Musical and OFDE. The Musical is not interactive and the tickets are more expensive than OFDE. However, what they crucially have in common is that both offered the public at around the same time a chance to be reacquainted with the well-known characters from OFAH in a new live performance setting. Both were being advertised at the same time. I accept Mr Hill's submission that some members of the public (at least) would only want to see one dramatic performance featuring the characters from OFAH and therefore there is a real likelihood of diversion of trade.

J. CONCLUSION

210. It follows that the Claimants' claims in for copyright infringement and passing off succeed. The table below summarises the conclusions I have reached in relation to each of the issues tried in question and answer form:

Issue No.	Issue	Answer	Para
<u>Copyright</u>			
1.1	Is the body of scripts for the Sitcom taken together a literary works for the purposes of copyright law?	No.	72

1.2	Is the character of “Del Boy” a literary work for the purposes of copyright law?	Yes	122
2.1	Is each script used in OFAH a dramatic work for the purposes of copyright law?	Yes	67
2.2	Is the Character “Del Boy” a dramatic work for the purposes of copyright law	No	121
2.2	Is the body of scripts for the Sitcom taken together a dramatic work?	No	71
3	What is the extent of the commonalities in content between the alleged works and the September Script?	There are significant commonalties	135
4	Were the commonalities identified in answer to Issue 3 the result of copying, directly or indirectly, from the alleged works and, if so, to what extent.	Yes	133
5	Were those commonalities which were the result of copying amount either individually or collectively to substantial parts of the alleged works, such that the copying of the September Script and/or performance of the Show to that script infringe any copyright in those alleged works (unless the defence under s.30A CPDA applies)?	Yes	136
6.1	If copyright was infringed, were the acts of infringement for the purpose of parody?	No	194
6.2	If copyright was infringed, were the acts of infringement for the purpose of pastiche?	No	195
6.3	Did any of the acts of infringement amount to fair dealing with the Claimant’s works?	No	196
6.4	Do the acts of infringement conflict with normal exploitation of the Claimant’s works?	Yes	196
<u>Passing Off</u>			
7	Did the Claimant own goodwill in relation to (i) the name Only Fools and Horses or (ii) the leading characters, in particular, Del Boy?	Yes (both)	200
8	Have any of the Defendants misrepresented that the Show is connected in the course of trade with the Claimant’s business?	Yes	206-208
9	Was there damage caused or a likelihood of damage being caused by any misrepresentation proved under Issue 8?	Yes	209