

High Court decides that Fringe show breaches copyright

A show regularly brought to Edinburgh Festival Fringe will no longer be permitted as it breaches the original writer's copyright.

Only Fools The (cushty) Dining Experience has been staged in a restaurant in Edinburgh for a number of years, drawing on the characters created by John Sullivan, OBE. The original show, Only Fools and Horses, won the National Television Award in 1997 among many other accolades. Mr Sullivan died in 2011 by which time the intellectual property rights in the show and its characters had been transferred to a company for the benefit of his family.

Even though the earnings of the show and related merchandise had to be shared with the BBC who retained 30 per cent, the money earned from Mr Sullivan's rights in the scripts amounted to £384,791 in 2009.

John Sullivan's son, James said in his written statement: "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."

The action became necessary after lawyers for the Sullivan family sent letters to the producers of the Dining Experience show which included characters such as Del Boy and Boycie from the original show, saying that the dining show "would inevitably involve an infringement of the intellectual property rights".

All allegations were denied, other correspondence followed, as well as court proceedings, and it was only in March this year that evidence was eventually heard in the High Court. In between Mr Sullivan Jr and comedian Paul Whitehouse had written and created a musical and some of the legal claim was that ticket sales could be diverted to the show rather than the musical.

There was much deliberation about the scripts and whether these taken together could be said to constitute a literary work over which copyright is held, and one particular script for the Dining Experience was used for comparison purposes with the original Scripts. The case also decided that there was copyright in a character

Deputy High Court Judge John Kimbell QC decided: "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."

The claims for passing off and infringement of the copyright belonging to Shazam, the Sullivan family company were successful.

The judge held, amongst other things, that the Show infringed Shazam's copyrights and its marketing and name was contrary to

the law of passing-off. He also held that the Show was not 'fair dealing' with Shazam's copyrights, for the purposes of parody or pastiche. Those working in the creative industries now have judicial guidance available in the judgment as to the ingredients for the previously untested defences of parody and pastiche.

Carl Steele, Partner at Ashfords LLP and head of the legal team representing Shazam, said: "The decision has major implications for those who wish to use such characters and who, in the past, might not have sought the copyright owner's permission to do so. It is also, to my knowledge, the first time an English Court has had to consider the law concerning 'fair dealing' of a copyright work for the purposes of parody or pastiche."

"I am delighted for Jim Sullivan and the wider Sullivan family. A big 'thank you' to the client, for having the trust and confidence in Ashfords and our Counsel, Jonathan Hill, to win this landmark case for them. Only Fools and Horses is a national treasure and its writer, John Sullivan, is recognised as having been a master of his art."

The same company also staged a show based on John Cleese's character in Fawlty Towers.



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