

Pastiche in UK law

An exception with regard to the use of a work or of a performance for the purpose of pastiche was introduced into the UK Copyright, Designs and Patents Act (CDPA) by The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (S.I. 2014 No. 2356) with effect from 1 October 2014. Pursuant to Sec. 30A CDPA, fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work. The exception applies only to economic rights and not to moral rights. In the absence of any definition in the Act, there has been much speculation regarding the meaning of 'pastiche', with a tendency towards a wide understanding of the term in tandem with its use in everyday language. As such, the notion of pastiche is capable of embracing a use that imitates the style of another work, as well as an assemblage (medley) of a number of pre-existing works.

In the case *Shazam Productions Ltd v Only Fools the Dining Experience Ltd et al* [2022] EWHC 1379 (IPEC), the Intellectual Property Enterprise Court (IPEC) was called upon to determine, inter alia, the meaning of 'pastiche'. The case concerned the use of characters together with their mannerisms and catchphrases from the well-known TV series *Only Fools and Horses* (OFAH) in the interactive dining show *Only Fools the (cushty) Dining Experience* (OFDE). The Judge had to examine whether that use, which was held to be an infringement of the copyright in the individual scripts and the main character Del Boy, could be justified by the pastiche exception. While the Judge agreed with the approach to take as a point of departure the everyday meaning of the term 'pastiche', there was nonetheless the need to read the exception in the light of the first step of the three-step test. A too broad interpretation of the term pastiche which would cover any imitation or reproduction of a work would no longer be a special case and would turn the fair dealing exception into fair use, which was not the intention of the European or the UK legislator. Ultimately, each case must be assessed on the basis of its own merits.

With regard to the case at issue, the Judge concluded that the use of the character and the scripts was not for the purpose of pastiche. There was no style imitation nor an assemblage of elements from the TV programme. Rather, the dining show involved wholesale borrowing of content which came close to a reproduction by adaptation. In view of both the quantitative and qualitative amount of the borrowing, such a use, even if considered as pastiche, would not have constituted fair dealing. In addition, the use of the scripts did neither convey a political message nor did it enter into an artistic dialogue with the original programme. Moreover, the use did compete with the normal exploitation of OFAH which came in various facets and affected the legitimate interest of Shazam as the rightholder in controlling the portrayal, presentation and commercial exploitation of the OFAH characters. Thus, the Judge agreed with the Claimant that the OFDE amounted in substance to a new episode of OFAH in the form of a dining performance which could not be justified by the pastiche exception.