

EIP

A Tale of Two Dragons

Fay Evans v John Lewis PLC & Anor [2023] EWHC 766 (IPEC)

Judgment has recently been handed down in the copyright dispute between Fay Evans, and John Lewis and its advertising agency over John Lewis' 2019 Christmas advert, which featured a young excitable dragon. The Judge has dismissed Ms Evans' claim and declared that the 2019 Christmas advert did not copy her book, "Fred the Fire-Sneezing Dragon". In addition the Judge ordered Ms Evans to publicise John Lewis' success in this litigation on her own website and social media accounts for six months.

Background

In late 2017 Ms Evans published an illustrated children's book called Fred the Fire-Sneezing Dragon, which tells the story of a young dragon who accidentally emits fire when he sneezes. This leads to unfortunate destruction which causes the young dragon to be shunned and sad, but in a stroke of good luck the dragon is able to put his sneezes to good effect by cooking the school lunch which saves the day.

In November 2019 John Lewis released its Christmas advert along with an accompanying illustrated children's book called Excitable Edgar. John Lewis' 2019 Christmas advert contained a similar story of a young dragon who emits flames in his excitement. This leads to unfortunate destruction including the incineration of the village's Christmas tree, which causes the young dragon to be shunned and sad. However at the end of the advert a young girl gives him a Christmas pudding, which the young dragon ignites at the village banquet to the cheers of the villagers.

Ms Evans on seeing the 2019 Christmas advert believed that John Lewis and its advertising agency had copied her work. Ms Evans drafted press releases making this allegation originally in November 2019 but also again in December 2020 and November 2021 to coincide with later John Lewis Christmas adverts. These press releases which

accused John Lewis of copyright infringement were made by Ms Evans in part to publicise her books and to promote a proposed musical based on Fred the Fire-Sneezing Dragon.

The Judge's finding that the 2019 Christmas advert was not copied

It was up to Ms Evans to prove that John Lewis' advertising agency had access to Fred the Fire-Sneezing Dragon and copied a substantial part of it in coming up with the 2019 Christmas advert. The Judge dismissed this argument finding that John Lewis and its advertising agency had not copied Fred the Fire-Sneezing Dragon, for three main reasons.

1) Firstly, John Lewis' advertising agency came up with the idea for a John Lewis Christmas advert featuring a fire sneezing dragon in 2016, more than a year before Fred the Fire-Sneezing Dragon was published. That 2016 outline concept already included most of the ideas alleged to have been copied namely, the idea of a cute, loveable and excitable young dragon that accidentally emits fire, which moves on two hind legs, that is disheartened following the destruction caused by its fiery emissions, but which earns the gratitude of the community by putting his fire to more useful purposes.

2) Secondly, the similarities between Fred the Fire-Sneezing Dragon and the 2019 Christmas advert which were not in the original document were not sufficient to make copying the likely explanation. In particular the size, colour, shape, facial features, and plot were not that alike and the choices for the 2019 Christmas advert were the result of choices by John Lewis' advertising agency and not copying.

3) Thirdly, Fred the Fire-Sneezing Dragon, had a very limited release with only 914 copies having been sold by the time of the 2019 Christmas advert. These sales were mainly in primary schools in the North-West of England, which is not where the individuals responsible for the 2019 Christmas advert lived. The Judge therefore found that there was no evidence to suggest, and no reason to infer, that the advertising agency had a copy of, or had ever read, Fred the Fire-Sneezing Dragon when they were creating the 2019 Christmas advert.

The Judge's finding that the 2019 Christmas advert was the result of independent creation despite the clear similarities to Fred the Fire-Sneezing Dragon should be seen against the background that certain tropes and traits are repeatedly used in stories. Indeed, John Lewis' advertising agency in its research for the 2019 Christmas advert found multiple other stories of dragons sneezing fire uncontrollably, dragons burning down or melting everyday objects, and dragons using their fire for good. The Judge even illustrated the great age of the idea of dragons sneezing and breathing fire with a quote

from the King James Bible.

p3

Publicity order against Ms Evans

Upon finding that John Lewis did not copy Fred the Fire-Sneezing Dragon, the Judge did not need to go any further and could have just dismissed the case. However, the Judge went further using her discretion to grant John Lewis a declaration of non-infringement and ordering that Ms Evans publicise the result of the judgment on her website and social media accounts for six months.

The Judge's reason for ordering Ms Evans to publicise the rejection of her claim, was that Ms Evans had created commercial uncertainty with her three and a half year publicity campaign against John Lewis which Ms Evans had to redress. This was described as the quid pro quo for Ms Evans' right to publicise her claims.

This decision of the Court should be a reminder to any litigant, that in some circumstances discretion is the better part of valour, as the Court can order a party to publicise its defeat in any litigation and the Court will be more likely to do so if that party has been actively creating commercial uncertainty for the other party.

The judgment can be found [here](#)