Is the number up for caricatures in advertising?

Brinsley Dresden and Rachelle Andrews

The advertising campaign for the number 118 118 service, featuring the now iconic 70s-style twin runners, has been an unmitigated marketing success. The campaign itself has won numerous awards, including Campaign of the Year 2003, but has not been without controversy.

The Regulatory Complaint

The controversy stems from a complaint by David Bedford, the 1970s world record-breaking runner to the regulators of television advertising, first the Independent Television Commission ('ITC'), and then Office of Communications ('Ofcom'). Mr Bedford's complaint was that the advertising campaign breached rule 6.5 of the ITC's Advertising Standards Code, which provides that 'with limited exceptions [none of which apply in this case], living people must not be portrayed, caricatured or referred to in advertisements without permission'. According to Mr Bedford, the long hair, handlebar moustache and running kit of the runners was a clear caricature of Mr Bedford in his athletic prime.

Mr Bedford's complaint was initially made to the ITC and was upheld in December 2003. 118 118 appealed. On 29 December 2003, the ITC ceased to exist, and was replaced by the Office of Communications (Ofcom), so the appeal was heard by the Ofcom Content Board. One further point of historic interest about this complaint is that it was the first television advertising complaint to be determined by Ofcom.

On appeal, the Content Board confirmed the finding that the 118 118 runners were a caricature of Mr Bedford 'by way of a comically exaggerated representation of him'. Since The Number had not sought Mr Bedford's permission, it was in breach of rule 6.5 of the Advertising Standards Code.

When reaching this decision, the Content Board decided that it was immaterial whether certain individuals did or did not recognise the advertising as caricaturing Mr Bedford, although that would almost certainly be important in any court proceedings. The Content Board also decided that it was unnecessary for the runners to be compared with Mr Bedford as he looks today, rather than at the height of his running career in about 1973, or for Mr Bedford to prove actual loss. In short, all that was needed was evidence to show that David Bedford had been caricatured. There is therefore no direct parallel between the findings of the Content Board, and the likely outcome of any court action.

In spite of its finding, the Content Board did not ban the advertisements, noting that Mr Bedford had delayed for about 6 months before making a complaint. During that period, 118 118 committed itself to very substantial expenditure to develop and continue with the campaign in relation to both production costs for new commercials, and buying media time and space. It also found no evidence that Mr Bedford had suffered any actual financial harm as a result of the caricature. The Content Board concluded that 'the effect of banning the advertisements would be disproportionately damaging compared with any harm suffered by David Bedford as a result of the advertisements'. It went on to note that 'any harm suffered by David Bedford as a result of the advertisements or of the public believing that he had endorsed the 118 118 service, or indeed in the public being misled on this issue, could be sufficiently addressed by publication of the Content Board's findings that there had been a breach of rule 6.5 and that David Bedford had not endorsed the 118 118 service'.

The prospects for any court action

Since the announcement of this decision, Mr Bedford has been quoted in the media as considering further court action. But would any court action be successful?

Recent cases such as that of *Douglas v Hello* have confirmed that there is no established right of privacy in the United Kingdom. Mr Bedford's most likely avenue of complaint, therefore, is under the tort of passing off, relying on *Irvine and Others v TalkSport Limited.* In that case, TalkSport digitally manipulated a photograph of the racing driver Eddie Irvine on his mobile phone and wearing his Ferrari team racing overalls, so that he was depicted holding a radio with the TalkSport logo on it, creating the impression he was listening to the station. In anticipation of its exclusive commentary of the forthcoming British Grand Prix, TalkSport then used the image in a direct mail campaign sent to key decision-makers responsible for buying radio-advertising airtime at a number of large advertisers. The aim was to persuade them to buy airtime during the commentary of the race.

When the case came to trial, the judge, Mr Justice Laddie, held that the advertisement was one that clearly gave rise to a false impression of endorsement of the radio station by Irvine, and concluded that the law of passing off should protect him from this infringement of his goodwill.

This case has been heralded as a legal breakthrough, as it was the first time that the tort of passing off had been applied to an allegation of false endorsement. However, as Laddie J noted himself, the law of passing off responds to changes in the nature of trade. As it is common for famous people to exploit their names and images by way of endorsement, Laddie J concluded that there is no good reason why the law of passing off should not apply to cases of false endorsement in modern trade circumstances.

According to Laddie J, a claimant in a false endorsement case would need to prove two interrelated facts. Firstly, he would have to show that at the time of the acts complained of, he had a 'significant' reputation or good-

will. Second, 'he would have to show that the actions of the defendant gave rise to a false message which would be understood by a not insignificant section of his market that his goods had been endorsed, recommended or were approved by the claimant'. Proving mere caricature is therefore not sufficient in a passing off action.

Although Mr Bedford had some notoriety in recent years arising from his involvement with the organisation of the London marathon, he has not had any really significant public profile since the end of his athletics career, about 30 years ago. So does he have the requisite 'significant' reputation for a passing off action to succeed? Unlike Eddie Irvine, for example, he does not engage in product endorsement activities. Even if people are aware of Mr Bedford's identity, this could well be due to the press attention that he has received as a result of his complaint to Ofcom, together with his ensuing efforts to attract publicity to his complaint. Well-publicised stunts, such as staging a protest at the launch of 118 118's new advertising campaign in March 2004, may well have helped raise his profile during his dispute with 118 118.

The next hurdle for Mr Bedford to overcome would be to prove that there had been a misrepresentation. The Content Board commented that its decision, once published, would correct any misrepresentation. This alone suggests that he would have great difficulty providing the requisite evidence to prove a misrepresentation. Even if viewers interpreted the advertising as referring to Mr Bedford, would they be likely to believe that he was endorsing 118 118? The nature of the campaign, the time that had passed since his sporting success, and the divergence between his modern day appearance and that of the 118 188 running twins make that highly unlikely.

The final key element of a passing off claim is damage to the plaintiff's goodwill. The Content Board's finding that there was 'no evidence that David Bedford had necessarily suffered actual financial harm as a result of the caricature' also shows that Mr Bedford would have significant evidentiary hurdles to overcome in this regard.

The extent of Mr Bedford's reputation and product endorsement activities would also be relevant for any award of damages, in the unlikely event that a court action was to prove fruitful for Mr Bedford. On appeal, Eddie Irvine was awarded £25,000, increased from an initial award of just £2,000. According to the court, this amount reflected the amount that Irvine would have been entitled to for lending his image to Talksport's marketing campaign. Bear in mind that at the time of the relevant events, Eddie Irvine was the number two driver at the Ferrari team, and the runner-up in the previous year's Formula One driver's championship. Since the advertising activity in the Irvine case was simply a promotional mailing sent to less than 1,000 people, however, it would be tempting to think that Mr Bedford would deserve more for what has become a highly successful multi-media advertising campaign. Unlike Irvine, however, Mr Bedford does not make significant amounts of money endorsing products and services. The fee that he would have commanded for lending his image to the 118 118 campaign is therefore likely to have been much lower.

Ofcom vs the courts

Ofcom has set the threshold for a breach of the Advertising Standards Code very low. Unlike passing off, it is not necessary to prove actual harm or loss, or even to show that people actually thought that Mr Bedford was being caricatured. Nor is the test whether a reasonable viewer of the commercial would believe that Mr Bedford was caricatured. Instead, the test is simply whether the Content Board itself believes that to be the case.

Rule 6.5 is headed 'protection of privacy and exploitation of the individual'. The test under rule 6.5, therefore, should not simply be whether an individual has been caricatured, but whether that individual's privacy has been infringed. If the purpose of the rule is to protect Mr Bedford's privacy, then clearly it must be his privacy in 2004, and not in 1973. The most that one can say is that there is a resemblance between Mr Bedford's appearance 30 years ago and the appearance of the runners. For this reason, it is difficult to see that his privacy has been infringed.

Covertly, then, Ofcom has considerably extended the level of protection currently afforded by parliament, the courts or the ITC in statute, case law or the relevant regulation. Ofcom's stance is also much stricter than the rules for non-broadcast advertising administered by the Advertising Standards Authority (ASA). Unlike Ofcom, the ASA did not uphold Mr Bedford's complaints about 118 118's press advertising.

Freedom of expression

Some commentators have remarked that Ofcom's decision has the potential to cut across the right to freedom of expression guaranteed by the Human Rights Act 1998. In enforcing Mr Bedford's rights under rule 6.5, it is argued, a balance must be struck with the rights of 118 118 to free commercial speech in accordance with art 10 of the European Convention on Human Rights. As Mr Bedford's appearance today is so markedly different from the appearance of the runners, the infringement of 118 118's right to free speech is not justified by the need to protect Mr Bedford's rights.

Ofcom's decision should not, however, be taken out of proportion. It did not, in the end, require the advertising to be withdrawn. Nevertheless, it should certainly cause advertisers and agencies alike to pause for thought before they use any kind of caricature in their advertising.

Brinsley Dresden (Partner, Head of Advertising Law) & Rachelle Andrews (Solicitor), Lewis Silkin, 12 Gough Square, London EC4A 3DW.