

COMPLAINT NUMBER	20/255
ADVERTISER	Spark NZ
ADVERTISEMENT	Spark NZ, Television
DATE OF MEETING	7 July 2020
OUTCOME	No Grounds to Proceed

Advertisement: The television advertisement for Spark NZ Ltd shows what appears to be an old black and white movie of New Zealand scientist Lord Ernest Rutherford sitting at a desk reading from a sheet of paper. Lord Rutherford's speech has been altered using technology, so it appears he is saying "...One hundred and twenty-five years ago, my research helped give rise to the first form of wireless communication. Since then, the world has witnessed unprecedented innovation. Today, machines learn, information has become currency, and we now stand at the dawn of 5G, the fifth generation of wireless technology. Just as I could only dream of the advancement of your time, I implore you now to dream of what lies ahead..." At the end of the advertisement it is revealed that it is a computer graphics imaging (CGI) of Lord Rutherford.

The Chair ruled there were no grounds for the complaint to proceed.

Complaint: I find it disrespectful for Spark to put words in a historical figure's (and national icon's) mouth. They obviously can't have got his permission and can't know whether he approves of 5G. It violates Rule 2(f) of the Advertising Standards Code: Use of testimonials and endorsements. It also probably violates section 13(e) (False or misleading representations) of the Fair Trading Act, but complaining to the Commerce Commission seems heavy handed given the offence.

See Appendix 1 for Additional information from Complainant.

The relevant provisions were Advertising Standards Code - Principle 2, Rule 2(b), Rule 2(f);

Principle 2: Truthful Presentation: Advertisements must be truthful, balanced and not misleading.

Rule 2(b) Truthful Presentation: Advertisements must not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust or exploit their lack of knowledge. This includes by implication, inaccuracy, ambiguity, exaggeration, unrealistic claim, omission, false representation or otherwise. Obvious hyperbole identifiable as such is not considered to be misleading.

Rule 2(f) Use of testimonials and endorsements: Advertisements must not contain or refer to any personal testimonial unless permission to use the testimonial has been obtained and it is verifiable, genuine, current, and representative of the typical not the exceptional. Advertisements must not claim or imply endorsement by any individual, government agency, professional body or independent agency unless there is prior consent and the endorsement is current and verifiable.

Procedural Matter

The Complainant raised a number of issues with regard to process and the management of their complaint. These matters have been addressed in separate correspondence to the Complainant. The Authority acknowledges there was a process error in not forwarding the initial complaint to the Advertiser.

The Chair noted the Complainant's concern the advertisement was being disrespectful by placing words in the mouth of an historical figure, Lord Ernest Rutherford, when he is longer able to speak for himself and it violates the ASA code on the use of testimonials and endorsements.

The Chair carefully examined the original complaint received and the additional information from the Complainant with concerns about the Complaints Board decision.

The Chair said the role of the Advertising Standards Authority was to consider the likely consumer takeout of an advertisement and assess whether this takeout complied with the relevant Advertising Standards Codes.

The Chair noted the consumer takeout of the Spark advertisement was 5G is one of the biggest scientific innovations since the time of Lord Ernest Rutherford. The advertisement created the impression that Lord Rutherford would have supported 5G technology if he had been alive. In Decision 20/095, the Board agreed the advertisement was not misleading because the majority of consumers would recognise the advertisement was a creative portrayal of what Lord Rutherford might have said if he could witness "the dawn of 5G".

The Chair acknowledged the Complainant's original complaint had raised the use of testimonials and endorsements as an issue and the Complaints Board had not specifically considered whether the advertisement was a breach of Rule 2(f) in Decision 20/095.

The Chair noted that Rule 2(f) meant any claim of endorsement required prior consent. With reference to Decision 20/095, the Chair ruled Rule 2(f) had not been breached for two reasons. The first reason is the majority of viewers would understand the advertisement was a creative portrayal of Lord Rutherford in relation to new technology. The second reason is for those who considered the advertisement did contain an endorsement, the Advertiser had obtained the permission of Lord Rutherford's estate, who worked with the Advertiser and approved the end product.

The Chair said the combination of the permission obtained from Lord Rutherford's estate together with consumers' understanding the advertisement was a fictional recreation of what a leader in the field of wireless technology might make of the 5G technology available today meant the advertisement was not misleading and had not used an endorsement without consent.

The Chair ruled the Complaint has not reached the threshold to breach Principle 2 or Rules 2(b) or 2(f) of the Advertising Standards Code.

The Chair ruled there were no grounds for the complaint to proceed.

Chair's Ruling: Complaint No Grounds to Proceed**APPEAL INFORMATION**

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website www.asa.co.nz. Appeals must be made in writing via email or letter within 14 calendar days of receipt of this decision.

APPENDIX

Appendix 1 - Additional information from Complainant

1. I have forwarded you a reply from the Advertising Standards Authority regarding a complaint I made about Spark's 5G Ernest Rutherford advertisement.
2. The email informs me that as the issues I raised have been ruled on in a similar complaint the Chair of the Complaints Board has indicated there are no grounds for my complaint to proceed.
3. In the email, the ASA asserts that a decision by the Complaints Board has been made on what it describes as a 'similar complaint'. Although the 'similar complaint' is regarding the same advertisement, I am concerned that (a) my complaint was not considered at the same time as the 'similar complaint' and (b) the 'similar complaint' did not cover all of my complaint.
4. Timeline: I submitted and received confirmation of my complaint in the same week as the other complainants – only five days difference as can be seen in the timeline below.

9th March - Original two complaints are made (unknown to me).

14th March - Confirmation received from the ASA acknowledging receipt of my complaint.

18th March - Date of a letter Spark acknowledges receiving from the ASA.

21st April - Date of Complaints Board meeting regarding the complaints of the other two complainants.

8th May - I receive notification of the Complaints Board's decision as well as an indication that there are no grounds for my complaint to proceed as the issues I raised have already been ruled on (a matter I hereby contest).

5. I am appealing the Chair's ruling that there are no grounds for my complaint to proceed, and the decision, dated the 21st of April, on complaint number 20/095 (Spark's 5G Ernest Rutherford advertisement), on the following grounds as discussed in the sections that follow:

- a) Natural justice has been denied.
- b) Proper procedures have not been followed.
- c) Evidence provided to the Complaints Board has twice been misinterpreted to the extent it has affected the decision.
- d) The decision is against the weight of evidence.
- e) My complaint has not been addressed in that the document does not state a final decision on whether it breaches Rule 2(f) of the Advertising Standards Code (Use of testimonials and endorsements).
- f) Related to (d), the Complaints Board did not state whether members of Rutherford's estate giving consent meant the Advertiser had acquired the relevant permission to edit footage to create an endorsement.

Denial of Justice

6. As the email trail and the summarised timetable show, my complaint was received in time for it to have been considered by Spark in preparing its response and to be bundled together with the other complaints and addressed together by the Complaints Board. This did not happen. Consequently, in ruling that my complaint had been addressed in the decision on complaint number 20/095 (the original decision) while denying me the opportunity to be part of that process, the Chair of the Complaints Board has pre-empted my right to appeal that

decision. Had my complaint been received after the Complaints Board had considered the original complaints then I would have accepted that to the extent that my complaint had already been addressed there was no recourse for appeal. However, by not dealing with my complaint in a timely manner and not bundling it with the other two similar complaints the Board has denied me the opportunity to appeal against matters that I should have had the right to appeal. This is a denial of natural justice. There were clearly matters in the original decision that I would have appealed and I have addressed these in my appeal of that decision here.

7. Secondly, the Chair of the Complaints Board is incorrect in concluding that the matters covered in my complaint were addressed in the original decision. Specifically, my complaint was on matters Section 13(e) (False or misleading representations) of the Fair Trading Act, and Rule 2(f) of the Advertising Standards Code (Use of testimonials and endorsements). At no point did the decision of the Complaints Board reach a decision on Rule 2(f). Therefore, in denying my complaint the Chair has reached an improper decision without substantive factual evidence on which to reach that conclusion and this is also a denial of natural justice.

The points of appeal are therefore:

- a) that in not dealing with my complaint in a timely fashion and not bundling it with the other two complaints addressing matters in common, the Complaints Board has denied me the right to appeal the decision made on those matters.
- b) The original decision did not in fact address a key point in my complaint, specifically Rule 2(f). In denying my complaint and right to appeal the original decision, the Chair has denied the opportunity for that part of my complaint to be considered. The matters covered in 2(f) are distinct from those under 2(b) (Truthful Presentation) of the Advertising Standards Code (and a decision on matters under 2(b) does not constitute a decision on grounds for complaint that are based on 2(f)).

Proper procedures have not been followed

8. As discussed in the previous section, my complaint was not dealt with in a timely manner and despite the Chair of the Complaints Board indicating that my issues were the same as the other complaints, I was not included in that complaints process and my complaint was never heard.

9. The decision document is factually incorrect in stating there were only two complaints, when at the time the Board should have been aware that there were at least three (as they had received my complaint also).

10. As noted in the previous section, my complaint also referred to a specific rule, 2(f), in the Advertising Standards Code, which the other complaints did not mention and as such my main complaint has not been addressed.

Appeal on grounds evidence has been misinterpreted

11. The Complaints Board has misinterpreted Spark's advert as an illustration of a benefit of 5G or being enabled by 5G even though Spark never indicated this in the advert or their response to complaints. It is not obvious to me that 5G has anything to do with the production of the advert or that the advert contains a hologram enabled by 5G, and I am wondering how the Complaints Board came to the conclusion "... the advertisement uses up-to-date technology, enabled by 5G, to make a hologram ..." or that Decision 19/386 (Vodafone's ad of a surgeon in Japan operating on a dog in NZ) was a relevant precedent decision. I had little problem with Vodafone's ad because it was obvious they were illustrating a potential

benefit of 5G as it involved communication over a distance (though they could have used fibre instead, 5G also works), and there were no other issues regarding Vodafone's advert.

12. As far as I can tell Spark's advertisement has nothing to do with 5G, except for Rutherford's endorsement. It looks to be an authentic recording (which I discuss in the next section) or enabled by a lookalike actor, computer generated imagery or advancements in machine learning that has led to a technology called Deepfakes (none of which are to do with wireless communication).

13. Deepfakes if they are done without a person's permission would most likely be considered illegal, but it seems Spark is taking advantage of the fact Rutherford is dead and cannot challenge the use of his image.

14. As Spark's advert is not an illustration of a potential benefit of 5G, but the Board has misinterpreted it as such, the Board's decision has been affected as they wrongfully concluded they had a relevant precedent decision in which the complaint was not upheld.

Second appeal on grounds evidence has been misinterpreted

15. The Complaints Board has made the assumption that the advert is a present day recording of what Rutherford would say if he were alive today: "The Board said the advertisement was not misleading because the majority of consumers would recognise that the advertisement was a creative portrayal of what Lord Ernest Rutherford might say if he was alive now ...". The Complaints Board also said "the advertisement uses up-to-date technology, enabled by 5G, to make a hologram of a historical speech by Lord Rutherford. In this speech he says '...One hundred and twenty-five years ago, my research helped give rise to the first form of wireless communication.' This statement makes it clear the scenario portrayed is a fantasy because no one could have lived that long ago and still be able to talk about it." From these statements it is clear the Board assumed the recording was made in the present day and this has affected their decision.

16. However, most of the cues in the advert point to a different, more plausible interpretation that can leave viewers wondering if the recording is authentic. The way the advertisement is done, it is possible that Ernest Rutherford recorded it all those years ago when he was still alive and musing on his predictions for the future. A consumer may not know whether 5G was anticipated back then as other things he mentioned such as machines learning was a theme in science fiction of the day.

17. The advert's black and white setting in what looked like his study, him being alive at the time, the vague innovations that were predictable in his time (aside from perhaps 5G), and his comment that "Just as I could only dream of the advancement of your time..." all suggest that it could have been recorded while he was still alive as some sort of time capsule project. About the only troubling thing is his mention of "... 125 years ago, my research ..." at the start of the video, but even this is not unusual as famous people sometimes make predictions of the future (e.g. George Orwell's book "1984"), and he could have recorded multiple versions of the video with different years. The end when it goes to a colourful fade out, could have just been Spark trying to make the recording seem more modern, and I am not sure whether the shorter version I saw on Choice had the colourful ending (as the video and script of the short version are unavailable to me, I cannot check). I do not know whether Spark made both the short and long versions available to the ASA

18. The Complaints Board's sole interpretation of the recording being made in the present day has led them to the decision that it is not misleading because it is obviously fake as Rutherford cannot be alive; however, the evidence suggests another possible interpretation

that the recording was filmed a while ago when Rutherford was still alive, so it is not obvious that the recording is fake.

The decision is against the weight of evidence

19. I am appealing the decision because it is against the weight of evidence. "The Complaints Board agreed the advertisement created the impression that Lord Rutherford would have supported 5G technology" (bold added). However, the Advertiser has no way of knowing whether he would have supported it or not, and I note in Spark's response they provided no evidence for the implication they broadcasted. The only conclusion one could take from this is they broadcasted the statements because it benefits them, even though they have little justification to believe it is the truth (there must be relevant precedent decisions for this; e.g. a sports drink healing broken limbs, or some other healing water claims). A consumer might know the monologue is not him but they would surely trust that the statements or implications were true because Spark is a big corporate and would have done proper research, and if they had not the ASA would have taken the advertisement off the air because it is false advertising.

20. Of particular importance is the implication the Complaints Board agreed would be taken by viewers: that Rutherford supported 5G. The basis for the view that Rutherford supported 5G is flawed. The fact that he detected radio waves from half a mile away can be used for a great number of technologies for example radio, television and cellular broadcasts, but does not indicate preference for any specific technology let alone a specific generation of that technology. It is clear from Spark's mention of the radio spectrum auction that their 5G product competes with other uses of his research; for all we know he could be against 5G because he feels that radio and television are better uses of the radio spectrum.

Concerns about how the Complaints Board weigh their evidence

21. I have concerns about how the Complaints Board weighs their evidence. "The Board said the advertisement was not misleading because the majority of consumers would recognise that the advertisement was a creative portrayal ...". Going by this logic, love scam emails would be considered not misleading by the Complaints Board because the majority of people would recognise them as fake, even though they are in fact totally misleading.

22. I also wonder whether the Complaints Board overvalued Spark's stated target audience of "...businesses and innovators" (typically seen as more informed) in making their decision, even though everyone sees the advertisement and Spark benefits from hype around 5G as people may think it is a desirable feature in a product and there may be less opposition to their 5G rollout.

An important decision regarding endorsement

23. The decision is important because it sets a bad precedent regarding endorsement from a deceased person who has not given their permission, and as far as I am aware there are no precedent decisions for this scenario

24. The big issues here are:

- a) using an endorsement from a deceased person when they have little or no association with the product and it potentially tarnishes the reputation of that person;
- b) whether that person's estate has the right to put or allow the putting of words in that deceased person's mouth, having the effect of the deceased person endorse a

- product or have their footage edited in a way where it is not obvious it has been edited; and
- c) whether it is false advertising for a person to endorse something they have no knowledge of as though they do have knowledge of it.

25. "The Complaints Board agreed the advertisement created the impression that Lord Rutherford would have supported 5G technology.", so it is an endorsement and Rule 2(f) of

the Advertising Standards Code is applicable (I won't repeat the text of the rule here).

26. I noted "The Complaints Board said [members of the estate's consent] meant the Advertiser had acquired the relevant permission to use the footage of Lord Rutherford.", which may be fair if they were in possession of it and/or held the copyright, but the Complaints Board made no decision on whether an estate has the right to provide the current and verifiable permission to edit footage to put words in the mouth of their associated person so as to create an endorsement from that person of a product that the person may not have endorsed. This is an important decision because as far as I am aware no precedent has been set, and so this decision may be referred to in future cases.

27. While the matter is important for any deceased person, it is even more important in this instance because Lord Ernest Rutherford is an iconic New Zealander with such honour that he appears on the NZ \$100 note.

Further comments regarding Rule 2(f)

28. I do not believe Lord Rutherford's estate can give permission for an endorsement when they cannot consult with the person who is supposedly giving the endorsement, and that person would have no knowledge of what they are endorsing. It seems stupid that his estate would have the right to say what he would think at any given moment of time.

29. A member of Lord Rutherford's estate could give an endorsement from themselves if they supported the concept, but it would need to be clear that it was not from Lord Rutherford.

30. It could also be fine if his estate had said we think he would have liked 5G (if they had reasonable grounds for their belief), because that puts them in the spotlight as well, and consumers can ask "Do I think they knew him well enough for their statement to be truthful or are they just saying it because it benefits them?". But by having the words come from his mouth it carries his weight; he is the only one in the spotlight so it does not necessarily risk Spark or Rutherford's estate's image. An alive person would care more about whether their image is tarnished by giving an endorsement. How much stuff will this impostor/puppet Rutherford be selling for Spark over the years and how much will the real Ernest Rutherford's image and reputation suffer from Spark's use of his name?

31. There is no information provided about Lord Rutherford's estate anywhere other than the letter from Spark which refers to members of his estate. It is not clear that all members of his estate were of the same view or even who comprises the members of his estate. To cite such a vague statement as that in Spark's letter as supportive of the decision goes well beyond what is acceptable if that is the justification for claiming that Rutherford would have endorsed the views attributed to him

Summary

32. I am appealing on the following grounds:

- a) Natural justice has been denied.

- b) Proper procedures have not been followed.
- c) Evidence has twice been misinterpreted to the extent it has affected the decision.
- d) The decision is against the weight of evidence.
- e) My complaint has not been addressed in that the document does not state a final decision on whether it breaches Rule 2(f) of the Advertising Standards Code (Use of testimonials and endorsements).
- f) Related to (d), the Complaints Board did not state whether members of Rutherford's estate giving consent meant the Advertiser had acquired the relevant permission to edit footage to create an endorsement.

33. I also expressed:

- a) my concerns about how the Complaints Board weighs evidence;
- b) why the decision is important;
- c) my view that only the person giving an endorsement can give consent to their name being used to endorse a statement or product and that others cannot give consent on that person's behalf unless they have consulted with them; and
- d) my concern that there was no evidence to indicate that the members of the estate consulted by Spark had the authority to grant permission for the use of the material, and specifically that there is no evidence that they were able to give permission for Lord Rutherford to endorse, or his image and voice to be used to seemingly endorse a product such as 5G.