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Genetically Enhanced Arachnids and
Digitally Altered Advertisements:
The Making of *Spider-Man*

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I. Introduction

1. It may be the ultimate in fiction. A comic book character born in sketches, bred in periodic installments, brought to life on the streets of Manhattan. He shoots a web from his wrists so strong and sticky that he can use it to swing effortlessly from building to building. He annihilates the ultimate insane villain — who incidentally travels on a hovering glider that fires pumpkin-bombs — and delivers the city of

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New York from evil. The means by which he attained his heroic strengths are arguably even more incredible: he was bitten by a genetically enhanced super-spider.

2. Although it may be the ultimate fantasy, the lawsuit filed against the Sony Corporation of America studio¹ that produced the 2002 *Spider-Man* movie is very real.² Sherwood 48 Associates, who own Manhattan's Two Times Square building, and the Super Sign Company, which leases advertising space from Sherwood, are the plaintiffs in the suit.³ That advertising space is recognized by laymen and New York City pedestrians as some of the impressive billboards found in Times Square between 47th and 48th Streets. The plaintiffs charge that the “defendants do not depict Two Times Square as it actually appears.”⁴ The allegation is not against the depiction of the “World Unity Fair” festival, which took place in *Spider-Man*'s version of Times Square, nor is it against the director's interpretation of Spider-Man's swinging technique. Rather, Sherwood asserts that, “defendants digitally superimposed the logo of ‘USA Today’ in the location at Two Times Square where, in reality, the ‘Samsung Spectacular’ sign appeared.”⁵ Further, the plaintiffs claim that, “on at least one occasion in the *Spider-Man* movie trailer, defendants also digitally altered the appearance of 1600 Broadway by ‘removing’ an NBC sign and replacing it with a sign for another company.”⁶ For Sony's actions, Sherwood seeks damages that include both the lost advertising revenues and the defendants' profits from the alterations.
3. Is it plausible that Sony could really be found liable for misrepresenting reality by changing a billboard ... in a movie about a teen-aged superhero who supposedly pinned “Bone Saw” McGraw⁷ in a two-minute cage match?
4. First written before the disposition of the lawsuit, this article addresses that question specifically, and more generally, it explores the subject of advertisements that are digitally altered. The purpose of this discussion is to consider such matters that implicate legal doctrine and rights, ranging from legal advertising and product placements to dubious acts that are statutorily unlawful and morally problematic. This article focuses on what to make of the hazy limbo between these two ends, as highlighted in the *Spider-Man* suit. The staked interests of the various parties involved — advertisers, owners of property, and consumers — are considered throughout. Finally, although the story in the *Spider-Man* movie has a happy ending where innovation triumphs over the status quo,

¹ The other named defendants in the suit are Sony Pictures Entertainment, Inc.; Sony Pictures Digital Entertainment, Inc.; Sony Pictures Releasing Corporation; and Columbia Tristar Film Distributors International, Inc. [hereinafter *Sony*].

² Defendant's Complaint, *Sherwood 48 Assoc. v. Sony Corp. of Am.*, No. 02-CV-52746 (S.D.N.Y., filed Apr. 9, 2002), available at <http://news.findlaw.com/hdocs/docs/spiderman/spiderman040902cmp.pdf> [hereinafter *Complaint*].

³ Collectively, “Sherwood.”

⁴ *Complaint*, *supra* note 2, at 31.

⁵ *Id.*

⁶ *Id.* at 32.

⁷ Notably, played by Randy “Macho Man” Savage.

many of the concerns raised here will not be resolved as easily.

II. Purely Legal

5. Virtual advertising involves digitally altering advertisements or superimposing products and logos where they did not appear during filming. Such practices are controversial under the current advertising contracts structure within the ad industry. A set of manageable agreements and some reasonable method of compensation for all those involved with advertisements doesn't exist yet, and it is unclear when the current situation will change. Exacerbating the problem is the enormous size of the U.S. advertising industry, amounting to approximately \$87.5 billion in revenues per year.⁸ But before rebelling against “fake” merchandise placed in the Thursday night television shows or other entertainment productions, it is important to first understand why the virtual advertising phenomenon is now becoming such a significant issue.

A. Product Placement

6. The first notable product placement in entertainment media dates back two decades, when in June 1982, America fell in love with a crooked little extraterrestrial creature, ET. The movie *ET: The Extra-Terrestrial* made Reese's Pieces candy the flavor of the week, upping sales 65 percent after it was released in theaters.⁹ For the Hershey Company, this placement was the deal of a lifetime. Where today product placements in movies run the pricing gamut as the product becomes increasingly visible or instrumental in the movie's plot line, the Reese's placement cost no money, “just free candy.”¹⁰ Studios today continue to receive free props in exchange for providing publicity to the companies' products in the films. “An estimated 90 percent of movie and almost all TV product placements involve no exchange of money — a legacy of U.S. ‘payola’ regulations from the 1950s.”¹¹ Since *ET*, product placement as a field has exploded, from America Online's omnipresence as an Internet Service Provider — and matchmaker — in *You've Got Mail!* to the highly-merchandised Bond flick *Tomorrow Never Dies*, featuring BMW luxury cars, Ericsson cellular phones, Smirnoff vodka, and Heineken beer, to name a few prominent examples.¹² Large fees are paid, entire companies structure their business plans around product placement, and the intended result is that consumers leave the darkened movie theater squinting from the sunlight and remembering that Will Smith and Tommy Lee Jones looked

⁸ Bruce Horowitz, *Believe Your Eyes? Ads Bend Reality: Digital Images Appear Real to TV Viewers*, USA TODAY, Apr. 24, 2000.

⁹ Dale Buss, *A Product Placement Hall of Fame*, BUSINESS WEEK ENTERPRISE ONLINE, June 11, 1998, at <http://www.businessweek.com/1998/25/b3583062.htm> (last visited Mar. 30, 2003).

¹⁰ Mike Bassett, *Teachable Moments: And Now, a Word from Our Sponsor*, at http://www.media-awareness.ca/english/resources/educational/teachable_moments_/word_from_our_sponsor.cfm (last visited Apr. 5, 2003).

¹¹ *Id.*

¹² See *id.* Product placement in *Tomorrow Never Dies* was the largest product-placement deal in history to date, worth over \$100 million.

suave in their Ray-Ban sunglasses worn in the movie *Men in Black*.

7. Product placement is picking up steam in television too. The trend is a relatively recent development as networks previously shied away from placing name-brand, trademark items in their series, opting instead for actors to use generic products.¹³ Recalling now the generic red-and-blue soda can of “Eighties sitcoms,” the idea has become almost laughable. But the market has been tapped and the floodgates are open as the product placement industry that once counted less than \$10 million in revenue in 1999 is now expected to surpass \$1 billion within five years.¹⁴
8. Generally, the use of product placement is accepted as a fair advertising practice, but consumer trust may wane. Some feel “it’s about lying and cheating ... [that] it takes advantage of the public’s belief that a broadcast of a real event actually conveys what’s going on.”¹⁵ This point may underscore an important distinction to be highlighted later in this article — the blurring of the line between fiction and reality. To be clear, consumers are not necessarily “brainwashed” by product placement and they are more often cognizant of the placement now, shaking their heads and throwing up their hands at the continuing commercialization of film and television. But really, the fluorescent orange iBook laptop computer by Apple was perfect for Reese Witherspoon’s Elle Woods in *Legally Blonde*.¹⁶ How else could she have made it through Harvard Law School in style? However, the quagmire deepens when the placed products are not physically present during the filming of the movie, but rather, added through digital editing. This phenomenon is dubbed virtual product placement and has steadily been gaining steam since the early 1990s.
9. Virtual product placements, though potentially unsettling, are entirely legal. Princeton Video Image (“PVI”),¹⁷ a leading virtual advertising firm based in Princeton, New Jersey, divides this burgeoning industry into several sub-categories.¹⁸ PVI uses a technology aptly named “live video insertion” (“LVI”)

¹³ See David Bauder, *Digital Products Placed on TV*, ABCNEWS.COM, Mar. 30, 1999, available at <http://abcnews.go.com/sections/tech/DailyNews/digitalads990330.html> (last visited Apr. 4, 2003).

¹⁴ Horovitz, *supra* note 8.

¹⁵ *Id.*

¹⁶ The literature available on the placement of the Apple iBook in *Legally Blonde* suggests that it was not a paid product placement. Rather, the producers selected it for its distinctiveness in classroom of black laptop computers.

¹⁷ See Princeton Video Image, at <http://www.princetonvideoimage.com> (last visited Mar. 30, 2003) [hereinafter *PVI*].

¹⁸ To be referred to and discussed throughout: (1) Virtual Signage: Targets the \$18 billion sport advertising market; (2) Game and Event Enhancements: Regular and branded first down line, and virtual strike zone; (3) Virtual Product Integration: For TV movies, sitcoms and syndication; (4) iPoint: Advertising and enhancements inserted at home providing totally individualized and interactive features in the program content itself; (5) C-TRAK: Tracking of images for insertion of virtual products and billboards that appear to be part of the original video. See *id.*

- for this process in general,¹⁹ and “virtual product integration” is the term used to describe basic product placement in television shows and syndications, which has flourished in the last few years. Citing a goal of making the product placements seamless and organic,²⁰ PVI declares the “true source of the brouhaha” to be the “high quality of the illusion rather than the use of the technology.”²¹
10. Denny Wilkenson, the president and CEO of PVI, is pleased with the results to date, stating “this is a huge opportunity to generate new revenue for the makers of TV shows.”²² While television stations initially were afraid that they would lose significant advertising revenue, it is now understood by the stations that virtual product placement can complement traditional 30-second spots.²³ The market has adjusted for this substitution. The president of ad sales at Pearson Television, which produces *Baywatch Hawaii*, says that virtual product placement on their show would cost the same as a 30-second commercial, about \$150,000.²⁴
 11. Syndicated television shows are an untapped market for increased advertising revenues. “A bottle of beer strategically placed in a scene from a syndicated TV series could carry almost any label. Rights holders could sell the space over and over again. Whenever the program is repeated, a different product could appear in the virtual space provided for it.”²⁵ PVI announced in June 2001 that starting last season, the *Law & Order* series to be rebroadcast on the TNT station would contain “brand names on cornflakes boxes, milk cartons, cola bottles, the lot, all bright and clear.”²⁶ If virtual product placement in syndication catches on, “logos [could] change with every rerun, and make syndication that much more lucrative.”²⁷ This application of virtual product placement would be dictated by contract, and it seems unlikely that either the rights of advertiser or viewers would be violated. Virtual product placements will become commonplace within the next few years if contract drafting accurately represents the rights of all involved parties and the placements are treated as commercials have been in the past — for this the price scales bode well.²⁸

¹⁹ *Action Alert: CBS News Doctors Images to Insert Ads*, FAIR: FAIRNESS & ACCURACY IN REPORTING, Jan. 20, 2000, at <http://www.fair.org/activism/cbs-digital.html> (last visited Mar. 30, 2003) [hereinafter *Action Alert*].

²⁰ Mark Armstrong, “*Law & Order*” Getting Virtual Ads? E! NEWS ONLINE, May 23, 2001, at <http://www.eonline.com/News/Items/0,1,8317,00.html> (last visited Mar. 30, 2003).

²¹ Louise Handelman, *A Sharper Image: Princeton Video Image Creates New Realities*, PACKET ONLINE, Jan. 31, 2000, at <http://www.pacpubserver.com/new/business/1-31-00/videoimage.html> (last visited Mar. 30, 2003).

²² Shelley Emling, *Computer-Generated Products Spark Dispute*, NEW STRAITS TIMES, COMPUTIMES, Sept. 27, 2001, available at <http://adtimes.ntsp.com.my/archive/2001/sep27d.htm> (last visited Apr. 5, 2003).

²³ Handelman, *supra* note 21.

²⁴ Horovitz, *supra* note 8.

²⁵ Rafi Azim-Khan, *Virtual Advertising*, ENT. L.R. 2001, 12(3), 95-96 (Apr. 2001).

²⁶ Christopher Reed, *Flakes on the Box*, THE BULLETIN, June 20, 2001, available at <http://bulletin.ninemsn.com.au/bulletin/eddesk.nsf/All/2569415419365513CA256A5D0004AE1B> (last visited Mar. 30, 2003).

²⁷ Armstrong, *supra* note 20.

²⁸ See *supra*, text accompanying note 26.

12. Interestingly, “only a handful of films, like *Citizen Kane*, have contractual protection from any kind of after the fact modification of content.”²⁹ As a result, advertisers ... will be able to integrate their product into programming to a degree not possible since the golden age of radio.”³⁰ One article considers “tasteful” digital product placement insertions into classic films, using an example of period Coca-Cola ads in the local language on a bar wall in *Casablanca*.³¹ This may be tasteful to some and novel to others — but to many, it may be just plain wrong. Possible alterations to a work at any point in the future must be considered from this point forward, and the desired integrity of the work should be sealed in contractual arrangements.
13. If not precluded by contractual arrangements, this practice is evidently legal. One writer considers the implications of virtually replacing products already in films, asking, “[s]ince no law prohibits the digital replacement of products already in films, could Coke pay to have Pepsi cans magically replaced with Coke cans...? If Pepsi hadn’t paid for the placement in the first place, would they have any legal recourse to being replaced?”³² This last query encompasses some issues presented in the Sherwood lawsuit, as the “replaced” billboards had not paid for placement in *Spider-Man*. This precise issue, however, was not raised by Sherwood’s lawsuit, and it still remains unresolved, potentially allowing for legal recourse.

B. Virtual Signage

14. Sporting events are an interesting lens through which to view the issues implicated by virtual advertising. Without virtual advertising capability, event enhancement graphics and graphic placement, both purely legal, would not otherwise be possible. “For sports events, virtual ads mean incremental revenue possibilities for networks, sports associations, the teams participating in the event and whoever happens to own the rights to the broadcast.”³³ For example, the San Diego Padres are cited in an article as having sold out all of their virtual advertising space³⁴ for the season’s home games — resulting in ad revenues of nearly \$1 million.³⁵

²⁹ Some may find it surprising that any pre-digital age contracts included such provisions at all.

³⁰ Glen Emerson Morris, *Virtual Product Placement*, ADVERTISING & MARKETING REVIEW, Aug. 2000, at http://www.ad-mkt-review.com/public_html/air/ai200008.html (last visited Mar. 30, 2003).

³¹ *Id.*

³² *Id.*

³³ Azim-Khan, *supra* note 25, at 95.

³⁴ A phrase that, while seemingly oxymoronic, is apparently now a term of art.

³⁵ Horovitz, *supra* note 8. *But see* Erich von Dietze & Geoff West, *Virtual Advertising: An Ethical Perspective*, Australian Institute of Computer Ethics Conference, July 1999, at 10, available at www.businessit.bf.rmit.edu.au/aice/events/AICEC99/papers1/VON99014.pdf (last visited Mar. 30, 2003). “No longer can the owners of a sporting venue control the advertising displayed at a game, and no longer can they be assured of receiving revenue generated by the advertising ... It is the television broadcaster who now gains control over advertising material and can manipulate it to suit their audience.” In combination, this evidence suggests that there are alliances between venues, broadcasters, and other interested parties.

15. “Virtual Signage” is the term PVI uses for the sports advertising market, which is often, though not exclusively, billboard-oriented. PVI itself was hatched from a sports-related scheme when Roy Rosser, an English scientist working in the United States, shared with his PVI co-founder his idea of “changing the signage at sporting events so that they could be tailored to various markets.”³⁶ The sports arena is the subject of the most literature and research on digital advertisement placement, having been involved with the international industry for years. These ads are placed in numerous shapes, sizes, and varieties, ranging from large logos superimposed on racetracks, to banners behind home plate, to traditional stadium placards, and to physically branding athletes themselves.³⁷ In some arguably tasteless placements available for viewing on PVI’s website, entire stadium fields are covered in advertisements.³⁸
16. Beyond the category of “Game and Event Enhancements,” such as the National Football League’s first-down line,³⁹ a halo around the cup for golf events, and national flags seemingly placed under the ice and at the bottom of pools at Olympic events,⁴⁰ digitally imposing images and advertisements at sporting events has actually proven to ameliorate playing conditions while taking safety concerns into consideration at certain venues. At a rugby match in 2000, it appeared to the audience that “both teams were playing in blue [uniforms]” when a rainy day resulted in the players being covered in paint from the sponsors’ logos that had been physically painted on the field.⁴¹ Rather than painting them on the track or infield, larger-than-life-sized logos superimposed on racetracks “satisfy the sponsor’s needs for premium exposure, while eliminating a potential danger to the drivers and ensuring that the televised coverage is focused primarily on the event and does not unnecessarily deviate onto advertising signs.”⁴²
17. An advertising safety concern was recently raised in the boxing arena when boxers began coming to the ring with temporary tattoos across their backs as advertising for GoldenPalace.com, an online casino. The Nevada Athletic Commission issued a ban on the henna logos, declaring that the tattoos were or could be distracting to judges during a bout.⁴³ Though a Las Vegas district court judge granted a request for a preliminary injunction against the ban, ESPN subsequently prohibited the tattoos because the matter related to its television broadcasts. The cable network “has banned ... tattoos on fighters participating in

³⁶ Handelman, *supra* note 21.

³⁷ Athletes have not branded themselves with digital ads to date, however, the possibility is not foreclosed. *See infra*, this section. PVI produces virtual advertising for soccer matches, golf, tennis, horse racing, wrestling, boxing, auto racing, and skiing. Examples of their work include Budweiser signs on boxing ring mats and the PENNZOIL logo “mowed” into the grass at racetracks. *See* Handelman, *supra* note 21.

³⁸ Though myself a 1985 Bears fan, I refer specifically to the NFL Today Ditka-Glanville image.

³⁹ Now defunct, Sportvision previously operated a website at www.lovethehline.com, an homage to the first-down marker that was broadcast on television football games.

⁴⁰ None of which, of course, are sponsored or visible at the live event.

⁴¹ Azim-Khan, *supra* note 25, at 95.

⁴² Dietze & West, *supra* note 35.

⁴³ *See Las Vegas Judge Rules in Favor of GoldenPalace.com Tattoos and Boxer’s First Amendment Rights*, GOLDENPALACE.COM, at <http://www.saratogamist.com/bragging/tattoo.html> (last visited Apr. 7, 2003).

- bouts it organizes — in some cases levying fines and threatening bans against boxers who break the rules.”⁴⁴ Rather than go to extremes — one writer ponders what would happen if a fighter permanently tattooed “GoldenPalace.com” on his back⁴⁵ — digital placement of ads on the backs or trunks of boxers might solve this quandary. This solution would allow the athletes to cut deals with advertisers without distracting officials.⁴⁶
18. The theory for product placement at sports events is that it “should appear entirely realistic and sponsors’ logos at sports events should never need detract from the play.”⁴⁷ Of course, this perspective only accounts for the players and spectators at the live event. In the future, viewers at home may be forced to deal with large, potentially distracting advertising, like have an Old Style logo superimposed on the center field turf at the Chicago Cubs Wrigley Field. Ratings may suffer for those broadcasters who choose to virtually place ads, but some novel and non-intrusive placements, such as virtual blimps, could prove endearing to the home-viewing audience.⁴⁸
 19. Advertising and marketing contracts seem to have already adjusted for virtual signage in international markets. It is not difficult to conceptualize higher prices for advertisements in more visible areas, for example the placards in front of bleacher seats during recent Major League Baseball home run record races. PVI adapts four different advertising logos in the middle of soccer fields, depending on the continent in which the event will be aired, “thus boldly demonstrating how advertising can be targeted to consumers on a regional basis via different broadcast feeds.”⁴⁹
 20. The U.S. Federal Trade Commission (“FTC”) has not voiced any concern over such targeted, virtual signage, and FTC officials say no complaints have been filed.⁵⁰ Lee Peeler, Associate Director for Advertising Practices at the FTC, explains, “It hasn’t been a major issue. In looking at any advertising technology, what the FTC wants to know is: does it misrepresent a material aspect of the product?”⁵¹ Calculated presentations of a product’s image do not seem to concern the authorities at this point.
 21. Foreign entities are better equipped to deal with issues surrounding these

⁴⁴ Christopher Saunders, *GoldenPalace.com Looks to Pro Racing*, INTERNETNEWS.COM, Aug. 30, 2002, at <http://www.internetnews.com/IAR/article.php/1455221> (last visited Apr. 9, 2003). The article also notes that Tonya Harding, Danny Bonaduce, and others wore temporary GoldenPalace.com tattoos during the Fox Network’s “Celebrity Boxing” broadcast in March of 2002.

⁴⁵ Jason Probst, *Tattoo Anything But You*, GOLDENPALACE.COM, Apr. 4, 2002, available at <http://www.goldenpalace.com/boxing/maxbox-04-04-2002.htm> (last visited Apr. 9, 2003).

⁴⁶ Not to mention, involving less pain and a less permanent decision for the boxer.

⁴⁷ Azim-Khan, *supra* note 25, at 95.

⁴⁸ For a wide variety of possible virtual enhancements, see *PVI, supra* note 17. Incidentally, the PVI Internet site has added a slew of new product placement features since research for this article first began.

⁴⁹ Handelman, *supra* note 21. See also *infra* Part IV.B.

⁵⁰ Horovitz, *supra* note 8.

⁵¹ *Id.*

quandaries, with established schemes that require virtual advertisers at sporting events to “inform viewers of the ads before and after the broadcasts.”⁵² Beginning in 2000, FIFA, the international football governing body, introduced detailed regulations to be applied to the use of virtual advertising at matches.⁵³

22. The United Kingdom’s Independent Television Commission (“ITC”) Code of Programme Sponsorship Rule 13.2 has been criticized as perhaps too stringent.⁵⁴ The base-line rule is that “visual or oral references to any advertising, signage or branding at an event must be limited to what can clearly be justified by the editorial needs of the programme itself.”⁵⁵ Some may be left wondering exactly which commercial advertisements are justified by the editorial needs of the program. With respect to virtual advertising, the rule states that it “cannot be used to place advertising additional to that which is at an event nor to place advertisements on unused billboards or other sites. Should the technology permit, moving imagery can only be used on ‘virtual’ billboards that replace actual advertising billboards that are themselves animated....”⁵⁶ The scheme is complex, and arguably arbitrary, but it is the current rule, requiring compliance by those within its jurisdictional reach.⁵⁷ Both ITC and FIFA regulations govern U.K. football broadcasts.⁵⁸

C. Shifting Paradigm

23. A possible explanation for the enormous growth in this industry is the decreasing audience for traditional 30-second commercials. When the first VCRs and time-

⁵² *Id.*

⁵³ Azim-Khan, *supra* note 25, at 95. Azim-Khan refers to British football (or American soccer).

⁵⁴ See THE INDEPENDENT TELEVISION COMMISSION, at <http://www.itc.org.uk> (last visited Feb. 6, 2003) for the Commission’s rules and regulations. For the ITC Code of Programme Sponsorship, see THE INDEPENDENT TELEVISION COMMISSION, ITC Code of Programme Sponsorship, available at http://www.itc.org.uk/itc_publications/codes_guidance/programme_sponsorship/index.asp (last visited Feb. 6, 2003).

⁵⁵ Azim-Khan, *supra* note 25, at 95.

⁵⁶ *Id.*

⁵⁷ It is strange that, although there is a complex scheme governing advertising in sporting events, product placement is not allowed on television in the United Kingdom. Rule 15.1 of the ITC Code of Programme Sponsorship states, “Product placement is defined as the inclusion of, or a reference to, a product or service within a programme in return for payment or other valuable consideration to the programme-maker or ITC licensee (or any representative or associate of either). This is not allowed.” THE INDEPENDENT TELEVISION COMMISSION, ITC Code of Programme Sponsorship, Rule 15.1, available at http://www.itc.org.uk/itc_publications/codes_guidance/programme_sponsorship/section_15.asp (last visited Feb. 6, 2003).

⁵⁸ FIFA regulations permit the application of virtual advertising on the center circle and the penalty areas of the field when the teams are not on the field (for example, the “tents” behind the goals), and on areas of the stadium used for real advertising, and flat areas of the stadium that could be used for real advertising. Virtual advertising on the field is expressly forbidden when the teams are on the field. It is also prohibited on any person including spectators, and in the air space above the stadium and which may be seen by the public or panned by television cameras. See THE FEDERATION INTERNATIONALE DE FOOTBALL ASSOCIATION, Regulations for the Use of Virtual Advertising, available at http://www.fifa2.com/fifa/handbook/Va/downloads/VirtualRegs_e.pdf (last visited Feb. 6, 2003). See also Azim-Khan, *supra* note 25, at 96.

shifting devices came on the scene in the early 1980s, the industry was shaken and concerned with what to do about marketing. Networks feared that if advertisers realized people could actually fast-forward a taped television show and skip the pricey ads, advertising revenues would plummet for the networks, and the “commercial attractiveness of television broadcasts would be diminished.”⁵⁹ The U.S. Supreme Court, in *Sony Corp. of America v. Universal City Studios, Inc.*, dismissed such commercial-skipping practices as tedious⁶⁰ and declared that nothing had really changed, stating that, “[a]dvertisers will have to make the same kinds of judgments they do now about whether persons viewing televised programs actually watch the advertisements which interrupt them.”⁶¹

24. As technology evolved, remote controls became the household scepter, allowing viewers to channel-surf rather than sit through commercial breaks. They had made the choice intimated in the *Sony Corp. of America* case, and as Homo sapiens devolved, “commercial skip” features on remote controls made this act even easier. Timers could now be set to flip the television back to the feature show after the two-to-three minute advertising break. VCRs are also becoming increasingly user-friendly — and advertiser-adverse — with additional commercial skip features that, depending on the model, either automatically omit commercials entirely or fast-forward through them upon playback. More recently, hard disc recorders⁶² allow viewers to skip commercials altogether, pause real-time shows, and watch the selected programs when they choose.
25. No longer are consumers a guaranteed captive audience. Viewers have taken control of their leisure time, increasingly refusing to waste the few precious free moments they have watching advertisements. This is not to say that consumers do not want direct marketing,⁶³ but if advertisers want to capture the attention of the audience, they must change their strategy to include integrated direct advertising available within television programming.

III. Purely Illegal

26. “We’re not going to have a war. We’re going to have the appearance of a war.” And with these words, Brean brings in the big guns. In the 1997 film *Wag the Dog*, Conrad Brean and his fellow political spin-masters deceive the nation into believing the United States is at war with Albania in order to direct attention away

⁵⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 452 n.36 (1984).

⁶⁰ Commercial-skipping practices refer to either pressing the “pause” button while the broadcast is being recorded or fast-forwarding through the commercials upon playback, guessing as to when the ads have ended. *Id.*

⁶¹ *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429 (C.D. Cal. 1979), *rev’d in part, aff’d in part*, 659 F.2d 963 (9th Cir. 1981), *rev’d*, 464 U.S. 417 (1984).

⁶² A major benefit of TiVo and other hard disc recorders is their time-condensing possibilities. By eliminating commercials, viewers can not only watch a 30-minute sitcom in 18 minutes, but they can do so at their convenience. *See generally* Wayne Friedman, *72.3% of PVR Viewers Skip Commercials*, ADAGE.COM, July 2, 2002, at <http://www.adage.com/news.cms?newsId=35293> (last visited Apr. 6, 2003).

⁶³ *See infra* Part IV.A.

from a presidential sex scandal.⁶⁴ They do so through digital manipulation of news clips — complete fabrication in fact. The president’s team calls in Hollywood producer Stan Motss⁶⁵ to create the war on-screen.⁶⁶ Starting with an American actress clothed in scarves and a peasant dress, Motss instructs the video editing team on how the scene must look when completed. The actress runs across an empty stage holding a bag of Tostitos in her arms. Motss and his team then get to work. They add a village behind her (from the “Village Library” directory), flames, screaming noises, sirens, a burning bridge, and a final digital replacement of the Tostitos with a calico kitten (from the “Cat Library”). The President then telephones and mandates that the calico be changed to a white cat. And so it is done: a young girl surrounded by falling rubble and debris is driven from her home by Albanian terrorists. News anchors across the country extol the footage — incidentally of primitive quality by today’s standards — saying that America has seldom witnessed a more poignant picture of the human race. The irony, to be sure, is thick.

27. And thus, the question of news alteration is broached. On one end of the scale, this should not be a concern. News is self-authenticating, and the public (despite *Wag the Dog* implications) will in all likelihood not be fooled by such extreme fraudulent and misleading activity. However, there are many situations that are less obvious but extremely problematic. Tom Brokaw opines, “I think that there is a lot of comment about the line between news and entertainment dissolving, but the fact of the matter is that it was always a blurred line.”⁶⁷ He points out that historically, selling newspapers was about the composition of the front page, and that journalism is a broader spectrum than a black and white print.⁶⁸

28. At the end of the DVD version of *Wag the Dog*, there is a video article entitled, “From Washington to Hollywood...and Back,” filmed one year after the movie’s original release. Barry Levinson shares his take on media falsification and alteration:

It is more the media in terms of how much manipulation is taking place on a day to day basis ... to the point where we

⁶⁴ The “Firefly Girl” who accuses the President of sexual misconduct in the Oval Office in the film is shown meeting the president in a crowd of people, wearing a beret. The movie, ironically, was released just weeks before the Lewinsky scandal broke. See, e.g., *From Washington to Hollywood...and Back, on WAG THE DOG* (New Line Productions, 1997).

⁶⁵ Motss is played by Dustin Hoffman, who was nominated for an Academy Award in this role for Best Actor. See, e.g., THESPIAN NET, *Dustin Hoffman – Awards*, available at http://www.thespiannet.com/actors/H/hoffman_dustin/awards.shtml (last visited Feb. 6, 2003).

⁶⁶ The real-life implications of this movie are numerous. The viewer is reminded of the national security meetings with Hollywood producers after September 11, 2001, to brainstorm about possible terrorist plots. This fact, combined with the scandal described in *supra* note 64, heighten awareness of the possibility of other parts of the plot — namely, media manipulation — actually occurring as well. See, e.g., Robert Jablon, *Hollywood Think Tank Helping Army*, THE ASSOCIATED PRESS, Oct. 9, 2001, available at 2001 WL 28750311.

⁶⁷ Tom Brokaw, in *From Washington to Hollywood...and Back, on WAG THE DOG* (New Line Productions, 1997).

⁶⁸ *Id.*

no longer are quite sure where reality is and those things which are fabricated. And it gets to be, I think, more sinister as time goes along because you'll be able to do even more things as we allude to in the movie by digitally putting someone in another environment. So that if seeing is no longer believing, then where are we? And we're really left to our own sense of morality. And how far does that play out?⁶⁹

29. The CBS network provides two juxtaposed illustrations along the news spectrum. In November of 1999, when the *CBS Early Show* first aired, it began "plastering the CBS logo and promotional advertisements over New York City landmarks."⁷⁰ The logo, seen only by television viewers, was placed on top of the Plaza Hotel, on the General Motors building where the show is broadcast, and the co-hosts of the show would "[a]bout once a week ... jokingly inform viewers that the ... logo just broadcast on, say, the back of a horse-drawn carriage at Central Park was make-believe."⁷¹ This is analogous to digitally placing logos on stadium turf, and is arguably not a cause for great concern. CBS executive producer Steve Friedman opined, "No one feels we're altering the editorial content of the program. It is simply part of our branding."⁷²
30. The second CBS example, however, alarmed the journalism community and viewers alike. During the Live-From-Times-Square CBS broadcast on New Year's Eve in 1999, a CBS logo was placed over Dan Rather's shoulder, obscuring and replacing that of NBC.
31. Fairness & Accuracy in Reporting, or FAIR, a national media watchdog group,⁷³ was outraged at the alterations, going so far as to urge its members and website visitors to e-mail Dan Rather himself, and write or fax the president of CBS News to express their discontent.⁷⁴ Eric Shapiro, the director of *CBS Evening News* and CBS News Special Events, told *The New York Times* that Rather did not know about the logo insertion. Although Rather did not protest when he learned of the action,⁷⁵ he later called the alteration "a mistake that he regrets."⁷⁶ Arguably one of the most respected journalists on television today, Rather apologized that he did not "grasp the possible ethical implications" of digital insertion, admitting that omission to be "wrong" on his part. He continued that, at the very least, CBS

⁶⁹ Barry Levinson, in *From Washington to Hollywood...and Back, on WAG THE DOG* (New Line Productions, 1997).

⁷⁰ *Action Alert*, *supra* note 19.

⁷¹ Horovitz, *supra* note 8.

⁷² *Id.* Friedman added, "Regular viewers have become addicted to guessing where *Early Show* virtual ads will show up next."

⁷³ For more information, see *What's Fair?*, FAIR: FAIRNESS & ACCURACY IN REPORTING, at <http://www.fair.org/whats-fair.html> (last visited Mar. 30, 2003).

⁷⁴ *Action Alert*, *supra* note 19.

⁷⁵ *Id.*

⁷⁶ Bill Carter, *CBS Is Divided Over the Use of False Images in Broadcasts*, N.Y. TIMES, Jan. 13, 2000, at C1.

should have informed viewers that alterations were taking place.⁷⁷ Levinson asserts, “It’s a hard thing when once upon a time things were real and some things weren’t real and now we begin to blur those lines between fact and fiction. Once the lines between fact and fiction blur, then we become more cynical and much more skeptical.”⁷⁸

32. Did CBS breach journalistic standards in the New Year’s Eve broadcast? CBS executives said that they did not, defending the move by “drawing a distinction between using the video-insertion technology to falsify news reports and using it in the background of a live anchor broadcast.”⁷⁹ Friedman asserted, “It does not distort the content of the news.”⁸⁰ While this reasoning appears sound, CBS would have been wise to further narrow its response because questions relating to the appropriateness of background alterations may arise in the future. For example, are overseas correspondents actually reporting on-site, or are they outside a hotel 60 miles from the action? While actual news may not be misreported, the potential misrepresentation of peripheral information and images is a concern.
33. Unfair competition concerns were highlighted when Leslie Moonves, the President of CBS television, spoke for CBS in defending the substitution of their logo for that of NBC, saying, “Anytime there’s an NBC logo up on our network we’ll block it again.”⁸¹ In the spirit of competition, this seems fair, though removing a logo seems to be emerging as a different animal than out-and-out replacement.⁸²
34. In situations like the one occurring with CBS, the replacement or omission may implicate and violate Federal trademark and unfair competition laws, which are detailed in the Lanham Act.⁸³ The major categories that could possibly be invoked in the virtual advertising context include misrepresentation (encompassing false and misleading advertising and passing off/reverse passing off), configuration and trade dress, misappropriation, distinctive advertising and merchandising, and right of publicity. Under the Lanham Act, it is unlawful to “use in commerce any word, term ... [or] symbol ... or false or misleading representation of fact, which ... in commercial advertising or promotion, misrepresents the nature, characteristics

⁷⁷ *Id.*

⁷⁸ Levinson, *supra* note 69.

⁷⁹ Eileen Rivera & Davin Hutchins, *Product Placements Go Virtual*, TECH LIVE, Feb. 7, 2002, available at http://abcnews.go.com/sections/business/techtv/techtv_productplacements_020207.html (last visited Apr. 5, 2003).

⁸⁰ *Action Alert*, *supra* note 19.

⁸¹ Bill Walsh, *CBS and Electronic Fakery*, MEDIA LITERACY REV., available at http://interact.uoregon.edu/MediaLit/mlr/readings/articles/CBS_Electronic_Fakery (last visited Mar. 30, 2003). The parallels with the *Spider-Man* suit are apparent, and will be discussed *infra*, in IV.C.2.

⁸² For a real-space analog, the reader should consider a “CBS New Year’s” banner being placed over an NBC logo during the broadcast.

⁸³ 15 U.S.C. § 1125 (2003). Section 43 of the Lanham Act is the governing statute, and generally prohibits false designations of origin and false or misleading descriptions or representations. State statutory and common law covering similar areas will not be addressed because it is beyond the scope of this article.

- [or] qualities ... of ... goods.”⁸⁴ This scope of this prohibition is broad and covers, among other categories, false and misleading advertising and passing off/reverse passing off. The key element to a successful unfair competition claim is establishing the consumers’ likelihood of confusion or the deception as to the good’s origin.
35. “When an advertisement is explicitly or ‘facially’ false, a court may grant injunctive relief under § 43(a) without reference to the advertisement’s impact on the buying public.”⁸⁵ When claims are literally true but have the potential to mislead, confuse, or deceive, courts will alternatively consider evidence of public reaction to the advertisement.⁸⁶ In comparison, passing off is the unexplained substitution of one party’s product when the product of another is expected or sought. It is often “accomplished with the assistance of deceptive representations or a confusingly similar trade identity.”⁸⁷ The analog to this claim is “reverse passing off” which has been found to occur when a “purchaser of goods removes the original trademark, substitutes another trademark ... and then offers the product for resale.”⁸⁸
36. Trade dress generally protects the distinctive shape of goods in commerce. While the appearance of a building may possess trademark significance under the proper circumstances, relief on these grounds is rare.⁸⁹
37. Misappropriation is a “controversial form of unfair competition which has had its scope and validity repeatedly questioned.”⁹⁰ *International News Service v. Associated Press*, 248 U.S. 215 (1918), still controversial, first enunciated the doctrine asserting that a party cannot benefit from another’s work. Misappropriation is often used generically by courts in trade identity cases with a meaning of unlawful taking and, similarly, in the “rights of publicity” context.
38. “Unfair competition cases respecting distinctive advertising and commercial characters typically invoke familiar principles of likelihood of deception as to source or sponsorship.”⁹¹ Most of the law in the area of distinctive advertising is directed at characters. The dearth of legislation and precedent in this area may have been Sherwood’s downfall and could be read to imply by its silence that virtual advertising is fair game as long as consumers are not confused or deceived.
39. The right of publicity is governed by state statutory and common law and generally covers a famous individual’s right to selectively choose endorsements

⁸⁴ 15 U.S.C. § 1125(a)(1)(B).

⁸⁵ BEVERLY W. PATTISHALL ET AL., TRADEMARKS AND UNFAIR COMPETITION: DESKBOOK § 8.02[5] (2001).

⁸⁶ *See id.*

⁸⁷ *Id.* at § 8.02[8][a].

⁸⁸ *Id.* at § 8.02[8][b].

⁸⁹ *See, generally*, *Two Pesos, Inc., v. Taco Cabana, Inc.*, 505 U.S. 763 (1992); *Rock and Roll Hall of Fame and Museum, Inc., v. Gentile Prods.*, 134 F.3d 749 (6th Cir. 1998).

⁹⁰ *See* PATTISHALL ET AL., *supra* note 86, at § 8.04.

⁹¹ *Id.* at § 8.05.

and commercial exploitation of his or her likeness.⁹² Lanham Act claims could potentially be read expansively in virtual contexts, as emerging technologies improve and become more prevalent.

40. PVI described one telling example that a potential client proposed to them. No doubt, they have had requests ranging from “the sublime to the ridiculous,”⁹³ but PVI seems to understand the import of their relatively non-delineated role, turning down the request from a foreign network broadcasting company to make the stands look full at a sparsely attended game.⁹⁴

IV. Purely Questionable

A. Privacy Visited

41. There may be cause for concern as technology progresses and as television and the Internet become increasingly intertwined. PVI co-founder Brown Williams envisions a mechanism that would synchronize consumers’ buying patterns with the virtual ads displayed on their television sets. Some of these features may prove to be desired and useful, such as the ability to click or touch a digital insertion and receive a coupon for the product.⁹⁵ From the television display, the consumer will be able to make purchases immediately online⁹⁶ — a product that has been scheduled for release sometime in 2003.⁹⁷ Jeff Chester, the executive director for the Center for Digital Democracy⁹⁸ warns of privacy concerns. “A family might see a virtual image of a station wagon inserted into a programme while their single neighbour might see a virtual image of a sports car. This is a kind of creeping fungus that will invade our lives in ways we never thought possible.”⁹⁹ However, as with Internet privacy mechanisms today, there may likely be an opt-out alternative that would limit advertising to the television screen and intrusion at bay.

B. Sports Revisited

42. While less controversial and purely legal digital placements of sports advertising were discussed earlier in this article, there are other more convoluted aspects of digital signage in the sports context. Perhaps because virtual ad placement at stadiums and other sporting venues has been a fact of sporting life for years, the

⁹² The right of publicity has not yet been extended to include inanimate objects, such as a famous building.

⁹³ Ivan Amato, *Lying with Pixels*, TECHNOLOGY REVIEW, Jul. 2000, available at <http://www.technologyreview.com/articles/amato0700.asp> (last visited Apr. 5).

⁹⁴ Horovitz, *supra* note 8.

⁹⁵ Emling, *supra* note 22.

⁹⁶ Handelman, *supra* note 21.

⁹⁷ *See id.*

⁹⁸ For information about the Center for Digital Democracy, *see* CENTER FOR DIGITAL DEMOCRACY, available at <http://www.democraticmedia.org> (last visited Apr. 5, 2003).

⁹⁹ Emling, *supra* note 22.

issues surrounding these placements are starting to intensify and mutate. Likely, the market is maturing, and key industry players are turning their thoughts towards divergences: the current scheme has been accepted, and now it is time to push the envelope. To stay alive in advertising is to always be on top of the game, and never settle for status quo when there is always a new market to tap.

43. Novel suggestions have begun to bloom, bringing with them a barrage of implications. A potential use of advertisement LVI technology has been suggested for ESPN Classic games, similar to syndicated television shows.¹⁰⁰ In this respect, firms who advertised at games decades earlier could reuse their own space, update ads and target the specialized market that watches sporting events that have been dubbed “classic,” a re-marketing of sorts. Replacing advertisements with those of different companies altogether may be considered unethical and encounter the same problems as redistributed movies encounter (such as the *Casablanca* example), including nostalgia and integrity concerns.
44. Another issue highlighted by the sports arena is marketing to different regional audiences. “For example, a Broncos/Steelers game at the Mile High Stadium may have ads for a Denver-based company, one which the fans in Pittsburgh watching on TV are unable to access or benefit from.”¹⁰¹ This type of advertising is “counterproductive” and “could easily be remedied with the help of video signal processing.”¹⁰² Linking regional advertising to product placement in non-sports contexts, local micro-brew beers and regional favorites could be inserted for different markets on regular television shows thus marketing to a more directed audience. The products could be changed for international broadcasts as well, leaving foreign audiences feeling less alienated.

C. Spidey Examined

1. Facts

45. Now, when we last left our superhero, he was leaping amongst parade balloons, battling a hovering Green Goblin in Times Square, defending the city. While the battle between Spider-Man and the Green Goblin dominates the foreground, the famed Times Square billboards rise majestically behind the fray.
46. These are not merely unremarkable interstate highway billboards. Times Square advertisers are encouraged to think outside the box when designing their ad space, as the area strives for “a cacophony of signage ... [with] a riot of lights and

¹⁰⁰ Baker, Gotze & Deroy, *Project Proposal 18-551: Virtual Advertising* (2000) (unpublished report, on file with Dep’t of Elec. & Computer Eng’g, Carnegie Mellon University), available at http://www.ece.cmu.edu/~ee551/Group_Proposals/5-proposal_text.doc (last visited Apr. 5, 2003).

¹⁰¹ *Id.*

¹⁰² *Id.*

designs [that] invoke the raffish spirit of 42d Street and Times Square.”¹⁰³ Advertising in Times Square dates back nearly a century. The first large electric-display billboard was erected in Times Square in 1917; billboards and advertisements have since grown to be so intertwined with the spirit of the area that zoning ordinances now require the buildings to be covered in billboards.¹⁰⁴ Advertising here is not cheap: companies pay six-figured rates — monthly — and hold billboard space for ten years at a time.¹⁰⁵ A tower recently constructed at Broadway and 47th Street that accommodates 75,000 square feet of advertising was “built exclusively for advertising.”¹⁰⁶ Advertising in this prime location is an industry in and of itself.

47. Clearly, the billboards in Times Square get airtime, and this is obviously the major reason companies choose to spend millions to advertise there. Gretchen Dykstra, president of Times Square Business Improvement District, understands why advertisers are eager to pay such steep rates for the prime location: “We get 20 million tourists a year and a lot of them are carrying cameras.”¹⁰⁷

48. In the dispute between Sherwood and Sony, the problems revolve around the fact that the *Spider-Man* promotional trailer displays the billboards at Two Times Square in an altered state. In Times Square, the billboards are displayed from top to bottom: Prudential, HSBC,¹⁰⁸ Samsung, Suntory Whisky, Coca-Cola.¹⁰⁹ However, in the trailer¹¹⁰ they are presented as follows: Prudential, no ad displayed, USA Today, Suntory Whiskey, and a non-descript lite-board. The lawsuit was filed against Sony on April 9, 2002, and a demand letter was concurrently served.¹¹¹ Greg Gulia, an Entertainment Law partner at Duane Morris LLP in New York, who handled the Sherwood suit, explains that Sony telephoned in response to the demand letter, promising to replace the ads that Sherwood complained had been altered. When *Spider-Man* was released May 3, 2002, the billboards at Two Times Square were presented: Prudential, no ad displayed, Samsung, Suntory Whiskey, World Unity Fair.¹¹² At that point, the suit was neither dropped nor settled.¹¹³

¹⁰³ John Holusha, *Times Square Signs: For the Great White Way, More Glitz*, NEW YORK TIMES, Sept. 1, 1996, § 9, at 9. Submitted with complaint as Exhibit A. All exhibits, available at <http://news.findlaw.com/hdocs/docs/spiderman/spidersuit040902ex.pdf>.

¹⁰⁴ See TIMES SQUARE, NEW YORK CITY, at <http://www.aviewoncities.com/nyc/timessquare.htm> (last visited Apr. 5, 2003).

¹⁰⁵ PSA Bibliography, *For Outdoor Advertising, Size Really Does Matter* (Mar. 19, 2002), available at <http://www.psaresearch.com/outdooradsize.html> (last visited Apr. 5, 2003) [hereinafter *PSA Bibliography*]. Submitted with complaint as Exhibit A.

¹⁰⁶ *Id.*

¹⁰⁷ Holusha, *supra* note 103.

¹⁰⁸ Discrepancy: in some pictures including Plaintiff’s Complaint Exhibit B, this billboard appears torn up and no ad — HSBC or otherwise — is displayed.

¹⁰⁹ Personal observation of Jacqueline Garry (May 6, 2002).

¹¹⁰ Available at <http://www.sonypictures.com/previews/spiderman/index.html> (last visited Feb. 7, 2003).

¹¹¹ Telephone Interview with Greg Gulia, Partner, Duane Morris LLP (May 6, 2002).

¹¹² The World Unity Fair is a fictional festival held in *Spider-Man*’s Times Square, complete with musical entertainment, inflatable parade balloons, and a special delivery of havoc from the Green Goblin.

¹¹³ Gulia, *supra* note 111.

49. A second set of billboards at 1600 Broadway, not present in the trailer, is displayed as follows: Discover Card, TDK, Cup of Noodles, Budweiser, NBC. The movie presents the strip of billboards: Cingular Wireless, TDK, Cup of Noodles, Beer, and NBC. While the details are difficult to conceptualize, generally it appears that the Samsung and NBC ads, both mentioned by name in the complaint, were the advertisements with which Sherwood was most concerned. Correspondingly, those are the ads that Sony changed back, though other billboards in *Spider-Man* remain slightly altered from their Times Square counterpart; for example, there is no ad for Cingular in the “real life” Times Square.
50. Sherwood’s complaint ostensibly claimed to protect the consumer, in the spirit of unfair competition law, averring that current advertisers and the general public will wrongfully believe that the defendants, along with USA Today, Cingular and others, are associated with or that advertisements thereof are sponsored by Sherwood, when in fact no relationship exists. Sherwood has no control over the quality or the use of the image of Two Times Square, 1600 Broadway, or the advertising thereon by the defendants or any of the movie advertisers, like USA Today, Cingular.¹¹⁴
51. In seven counts, Sherwood asserted violations of the federal Lanham Act, New York law, and common law. The federal counts were trade dress infringement, false endorsement, unfair competition — passing off and reverse passing off, and common law unfair competition. The alleged New York state deceptive trade practices included deceptive trade practices, and dilution and injury to business reputation. The complaint also proffered a novel claim of “electronic piracy and trespass,” charging that by electronically altering the advertising space, the defendants appropriated the plaintiffs’ electronic advertising rights and therefore trespassed on Sherwood’s property.¹¹⁵ The billboard discrepancies are perplexing, compounded by a strong, nagging, and almost blatant underlying notion: *Spider-Man* is fiction, in the strongest sense of the word. The question looms, what gives Sherwood, or any party other than Sony for that matter, the right to dictate the decoration of *Spider-Man*’s Times Square?

2. Analysis¹¹⁶

52. Sherwood complained on their own behalf, and that of two third-party classes: advertisers and consumer-viewers. Concerning advertisers and their own business’s profit margins, Sherwood submitted that it was “less likely that major corporations and advertisers will contract for advertising space at ... Sherwood’s ... properties because the amount of exposure and, therefore, the residual value of

¹¹⁴ See *Complaint*, *supra* note 2, at 44.

¹¹⁵ See *Complaint*, *supra* note 2, at 80.

¹¹⁶ Because of potentially endless list of hypothetical examples, the complaint must necessarily be examined within the confines of this specific example: the alterations of several billboards in the *Spider-Man* movie. Additional issues and implications are discussed elsewhere in this article.

their advertising will be diminished.”¹¹⁷ But nowhere is it written in the contracts between Sherwood and their clients that the billboards will be seen anywhere but on the street in real-life Times Square. It is possible — and likely — that the implicit convention of Times Square advertising practice includes incidental, fortuitous, and profitable advertising in movies, television shows, and other mediums. However, Brian Turner, the president of Sherwood Outdoor himself, declared that “[w]e can’t even tell an advertiser how many impressions they are getting.”¹¹⁸ If this is the case — if no claims are made as to any audience size — Sherwood is hard-pressed to demonstrate that a decreasing audience size will stifle business, and accordingly this theory should have failed.

53. The consumer-viewer must not be ignored in this game, especially considering the immediate and intense popularity of the film¹¹⁹ — it took in an astounding \$114.8 million its first weekend in the theaters. It is safe to say that the vast majority of movie-goers opting to watch Spider-Man scale skyscrapers did not expect much reality.¹²⁰ If they expected anything, it was an entertaining adaptation from Stan Lee’s decades-old comic book series. The comic book, color-block, exaggerated Americana style that typifies Spider-Man and his superhero cohorts — along with movies themselves as an entertainment medium — is an escape from reality.
54. In one of *Spider-Man*’s more colorful scenes, a billboard displaying the words “World Unity Fair” is displayed on Two Times Square. This, obviously and undeniably, is a digital replacement. In response to this detail, Gulia offered that perhaps the alteration line can be drawn at how much the advertisements and background details tie into the plot, compare to how much is sheer removal and replacement.¹²¹ Along this line of reasoning, he no doubt would approve of the fictitious “Daily Bugle” marquis covering another Manhattan building in the film.¹²² The line, however, is difficult to draw, and is blurred ever further by introducing hypothetical scenarios like whether it is infringement to show characters at a real-life restaurant drinking Pepsi, when in actuality, the establishment sells Coke? If the New York Police Department officers drive Ford Crown Victorias, is it infringement to portray them in a fictional movie driving Chevy Blazers? Though the choice of soda or cruiser may not be integral to the advancement of the plot, it is difficult to imagine how these artistic and logistic choices could be actionable.
55. Perhaps the true heart of the matter is that Sony is a direct competitor of Samsung. A “cleaner” solution for Sony would have been to film the allegedly infringing

¹¹⁷ See *Complaint*, *supra* note 2, at 42.

¹¹⁸ See *PSA Bibliography*, *supra* note 105.

¹¹⁹ In fact, the relative popularity of the film may be important because Sherwood might not have filed a lawsuit if the film were projected to gross a relatively small dollar amount. For example, the lawsuit might not have been filed if the billboards were altered in an unpopular and rarely played music video.

¹²⁰ However, Sony did choose to remove the World Trade Center towers from the film, a decision of which the moral implications cannot be compared to advertising dollars.

¹²¹ Gulia, *supra* note 111.

¹²² *The Daily Bugle* is the newspaper where Peter Parker (Spider-Man’s alter-ego) works as a photographer.

scene in a different locale, but as Sherwood would undoubtedly agree, Times Square is truly a one-of-a-kind venue in this situation. Details on whether Sony solicited the ads to Cingular and USA Today are inconclusive, and whether that should be a prime factor probably was not determinative. The predicament is reminiscent of the CBS-NBC New Year's Eve situation discussed above. The implications are similar, and the reader questions why Sony should not have the right to block out the competition in *Spider-Man*, which was a significant investment and risk to produce. But again, blocking out and replacing images are emerging as two different situations.

56. The line might become clearer if the situation were framed in a non-fiction setting. If a portion of a true-to-life movie or documentary were filmed in Times Square, advertisers who were digitally removed from the film would probably have a better case. In that situation, audiences would be expecting a real-life portrayal, and the claim of a non-realistic portrayal of Times Square would seem more plausible.
57. Another suggestion is that Lanham Act claims in these scenarios could be determined by whom the audience sees as the endorsers. For example, is Samsung arguing that they are endorsing Sony's film, or is Sherwood worried about who they are endorsing? Such analysis would require an understanding of what the audience thinks when watching the movie. Since the Lanham Act also only considers goods and services used in commerce, an additional question may be whether this requirement is satisfied when the film is used in a commercial context itself but the billboards captured within the film are also used for a commercial purpose. The fact that the billboards did not create revenue for Sony will be key factor here. A sliver of an argument remains when the trailer is considered. Did the use of the billboards draw viewers to the theater?¹²³ Perhaps a feel-good movie staged in Manhattan is something the public would have paid to watch regardless.
58. *Sherwood 48 Associates v. Sony Corp.* came before Judge Richard Owen in the United States District Court for the Southern District of New York on July 30, 2002.¹²⁴ The court dismissed the complaint perfunctorily, if creatively. The opinion rhetorically asks whose purchasing decisions were affected, indicates that the trade dress of the buildings is altered constantly, and offers that "bouncing a laser beam off a building to create a digital photograph" happens around the clock with respect to the buildings and the advertisements. The other allegations were dismissed in a footnote, as if not even warranting serious consideration. The court held that Sony's theatrical purpose of orienting the viewer to the location of the movie scene had First Amendment protection.

¹²³ A third promotional trailer for the film was subsequently released months after the *Spider-Man* debut in theaters, in which the billboards displayed the advertisements as seen in the movie — that is, showing Samsung. See *Spider-Man Movie From Columbia Pictures*, at <http://www.spiderman.sonypictures.com> (last visited Apr. 5, 2003).

¹²⁴ *Sherwood 48 Associates v. Sony Corp.*, 213 F. Supp. 2d 376 (S.D.N.Y. 2002).

V. Conclusion

59. Sherwood's requests were heeded before the release of what will prove to be one of the highest-grossing movies of all time, and as predicted, its legal claims were too far-fetched to stick. But *Spider-Man* may still serve as a warning and a model for future advertising issues. Two sequels to *Spider-Man* are due out within the next four years. The industry will have undoubtedly matured by then, and many of these questions relating to virtual advertising and digitally altered images may have been answered by that time.
60. The virtual product placement industry is burgeoning, thanks to high-technology gadgets creating incredible opportunities for increased rents. If players take the lead from *Spider-Man* and use their powers ethically, for useful and valuable purposes, a new generation of advertising contracts will gloss over the old paradigm, exhibiting the beneficial uses of technology. However, creative advertising questions will always remain or evolve, as technology continues to improve and new methods of advertisement and placement are concocted.
61. Brown Williams, co-founder of PVI, a leading innovator in the advertising technology industry states, "We think we're going to change the definition of what an ad is. It scares the heck out of guys who make ads. And it scares the heck out of me."¹²⁵ The storyline with advertising is certainly left open for a sequel.

¹²⁵ Horovitz, *supra* note 8.