



SPIDER-MAN'S WEB TRESPASS

By: Jim Astrachan

Why did the owner of the famous Two Times Square building in New York City, one of the world's premier advertising locations, develop arachnophobia? After Sony featured the building in its Spider-Man movie, should the building's owner have called for an exterminator instead of suing for unfair competition and digital trespass?

The owner of Two Times Square, a heavy hitter by anyone's standards, owns two other famous Times Square buildings and is the exclusive agent for forty signs affixed to Times Square buildings. These signs account for thirty percent of all Times Square commercial signage, likely the world's most expensive outdoor sign placements; their annual rental exceeds the GNP of many countries.

450 million people pass through Times Square each year; Web sites provide world-wide, real-time, images of this location. Times Square is depicted in movies, and television. For these reasons the owners of advertising space on the side of the Two Times Square building can command top dollar from advertisers who demand international exposure.

Samsung's Two Times Square electronic sign is 45 feet high and 40 feet wide. It is so prominent, it is said, that airplanes leaving Gatwick Airport navigate west to New York by its light.

Two Times Square learned this spring that Peter Parker, the daily identity of the super hero, Spider-Man, had agreed to end his retirement and assume his Spider-Man role on film for Sony Corporation.

As Mr. Parker trained to cling to the sides of tall buildings, and swing on gossamer thread, Sony introduced the film by release on the Internet of a short trailer. Times Square and the Two Times Square building are featured three separate times in the trailer, but is not depicted as it actually appears. Instead, Sony, who had sold promotional space in the new movie to other advertisers, digitally superimposed USA Today's logo where Samsung's sign really appears and re-oriented the building. The Samsung sign was gone. While USA Today, who paid dearly for this placement, was pleased, Two Times Square and Samsung were not.

Had the Green Goblin struck? Believing that Sony would replace Samsung's ad in the actual movie, the buildings' owners sued.

The suit alleged trade dress infringement, false endorsement, unfair competition, injury to business reputation and electronic piracy/trespass.

Applying Spider-Sense and Spider-Leaping over the allegations contained in Two Times Square's complaint, the United States District Court dismissed every count.

There was no unfair competition, said the Court, ostensibly because the relevant audience that must be confused are those companies that actually lease advertising space on the buildings. There was no evidence before the Court that these advertisers were, or could have been, confused as to the source of the building altered by the digital transplant. More on this later.

Nor was there any trade dress to be infringed, as the buildings' advertising dress was always changing. As such, there could be no recognition-based confusion of Sony's depiction of the buildings.

Finally, the Court was under-whelmed by plaintiff's contention that Sony had digitally trespassed. It wrote:

. . . and trespass? – bouncing a laser beam off a building to create a digital photograph? Light beams bounce off plaintiff's three buildings day and night in the city that never sleeps.

Perhaps the Court backed into its dispositive decision with the above rulings, because ultimately it concluded that Sony's film treatment of Times Square deserved First Amendment protection. It found that what was created was, for

artistic purposes, a mixture of fiction and an actually depicted Times Square, central to the major scenes in the movie, and serving the theatrically relevant purpose of orienting the view to the famous mid-town New York location. In other words, the buildings and all other New York landmarks were anybody's to film and alter.

Agreed that there should be allowed a certain amount of artistic latitude to move famous buildings around to suit legitimate artistic purposes such as films. What is troublesome about this decision, however, is not the manipulation of the buildings but the sale by Sony of advertising space on the side of a highly recognized building where another's advertising was already placed. Surely Sony would have had the same artistic impact had it depicted Samsung's ad in the trailer and film. But then, there would have been no financial advantage to Sony caused by the sale of space on the side of the building. Perhaps the court might have tried harder to balance First Amendment rights with blatant commercialism.

The building's owner might have pushed harder to assert that the building is a recognizable trademark and its use constitutes an infringement as an endorsement by, or an affiliation with, Sony. Owners of the Chrysler Building and the Rock and Roll Museum have asserted these rights. After all, a building's exterior can serve as a trademark which identifies the owner's services from another's, but it must be used as a mark in the promotion of its services.

To assert trademark rights in the future, the building's owner might consider using a depiction of the building, as a mark, on promotional materials, letterhead and ads.

Oh well. Could have, should have, would have. . . .

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