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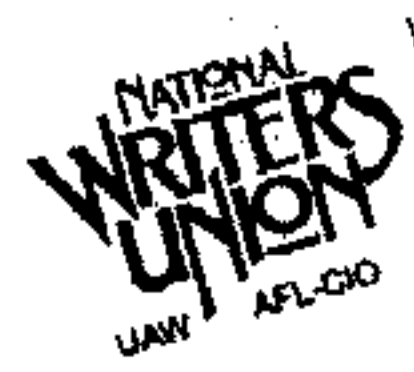
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The New York Times

TUESDAY, OCTOBER 6, 1992



337 17th Street, Suite 101
Oakland, CA 94612

Highway robbery

The information superhighway has not yet reached homes, but the legal issues it raises are already generating traffic in the courts

By Josh Sides
Class Staff
Peter Marx
Armsy bel
the forthcoming
periodic

"We would be happy to negotiate a reasonable fee."
JONATHAN TASHI
National Writers Union

Writers Sue Publishers Over Articles in Databases
By WALL STREET JOURNAL Staff Reporter
NEW YORK — The battle over electronic-publishing rights escalated as 10 freelance writers sued five companies, including New York Times Co. and Time Warner Inc.'s magazine group, claiming that articles they wrote were published in electronic databases without their permission and without compensation.
Although the...

Free-lancers and the information highway

Writers union plans to...

BUSINESS

COMPUTERS MAKE IT EASY TO STEAL

As technology advances, copyrighted materials are becoming more vulnerable

By James A. ...

Infohighwaymen

By Nicholson Baker

BERKELEY, Calif. Intellectual property has become an opulent, sophisticated, even somewhat debauched region of the law. Individuals and corporations have staked legal claims to slogans, facial and vocal likenesses, melodic snippets, genetic sequences, bits of mathematical reasoning, unpublished letters and the look and feel of software programs. It's a little startling, then, to discover that something as traditional as a printed page can still routinely fall prey to acts of verbatim for-profit theft.

Yet in the supposedly cutting-edge world of the electronic data base, thousands of surprisingly old-fashioned, Brooklyn Bridge-style recyclings and resellings are in progress. Data base companies are using their status as "indexes" to shield themselves from the legal obligations that the rest of the publishing industry has developed over several hundred years.

The National Writers Union is now

Some data bases pirate magazine articles.

questioning the right of one text-poacher to furnish magazine articles to buyers without the authors' consent. Articles, essays and book excerpts of mine that first appeared in The Atlantic Monthly, The New Yorker and Playboy are among the many thousands of offerings available by fax (at \$8 per retrieval) or electronically (at \$3 per retrieval) from The Magazine Index, a service of Ziff Communications that is distributed on the internet by the CARL Corporation.

Some of these pieces will appear in a forthcoming collection; others are excerpts from books currently in print. (I own the copyright to all of them.) I was never asked by the Magazine Index whether I wanted my work faxed or downloaded to credit-card buyers on demand, and I would not have given the company permission if I had been asked.

Out of curiosity, I ordered several of my own pieces from the company. The service is expensive (a single faxed article for the price of a paperback), it is troubled by typos (one piece of mine is listed under "Nicholas Baker"), it is not dependable (I

Nicholson Baker is author, most recently, of "The Fermata."

was charged for pieces I never received), and, most important, it was built on piracy — that is, on the republication of materials for financial gain without their creators' consent.

It is not unlike the sort of piracy that flourished in the industry in the 18th and early 19th centuries, when unscrupulous American publishers would hastily, and without obtaining the assignment of any right, bring out editions of books legally printed in England.

What about the magazines that printed the articles in the first place? In my experience, most magazines have little interest in subsidizing or helping to build data bases by selling rights to things they don't own. They are in some cases unaware of the secondary commercial uses to which their publication is being put.

The Magazine Index (and others such as the Electronic Newsstand and Uncover) are playing on the confusion that reigns in the area of electronic-document delivery, and on the fears of some magazine editors that if they don't go online somehow fast they will be left twirling twigs to make fire in the imminent hypertextual bouleversement. This isn't going to happen, but in the interim a few companies have found that there is money to be made off of open-ended deals with fretful editorial departments.

One solution to the problem, now proposed by the National Writers Union, is to create a royalty-sharing plan modeled on the music industry's Ascapi system. (Call it Madcap, for Magazine and Document Choice and Profit.) Whenever a magazine data base "plays a single" (downloads or faxes an article to a consumer), some percentage of the fee charged would trickle down to the person who wrote the piece.

It's interesting to speculate what the hit singles might be in this proposed arrangement. They wouldn't necessarily be big cover stories in general interest magazines, since those already have a wide distribution.

Rather they might be obscure genealogical treatises, how-to tips for the beginning designer of flume rides or sell-your-satellite-dish-and-lease-it-back money-making schemes that appear in specialized periodicals with narrower newsstand penetration. Whoever the new database stars are, they deserve some dignified fraction of the money being charged for their prose.

A writer should have a say in determining who will sell his or her words, in what format and at what price. I write for magazines, not (yet anyway) for expensive intermediaries who are interested in using our fax machines or inkjet cartridges as their printing press. □

ARTHUR ANDERSEN AND ME

LIKE MOST OF YOU, I CAN claim no special insights into the Enron scandal. I do, however, have inside information about the Arthur Andersen accounting firm suggesting that Mark Twain's formulation be amended. There are, it seems, lies, damned lies, and accountants.

In Enron's case, this accessory to "the genius of capitalism" shredded incriminating documents. In my case, the only thing Andersen shredded was its own credibility.

In 2000, I was a consultant to attorneys who settled a class-action copyright infringement suit, *Ryan v. CARL* – the first of its kind in the history of American jurisprudence. The terms included the payment by the owners of a company called UnCover of a total of \$7.25 million to settle claims that this article delivery service had systematically copied and sold authors' works without permission or compensation. (For the full story, click [here](#).)

Having spent six years grabbing confused writers by the lapels, alerting them that they were being knocked off by newfangled electronic database operators and explaining what I was doing about putting a fair share of money into their pockets – first as assistant director of the National Writers Union and then as a consultant – I applied to the class attorneys for the position of administering class notice and claims processing. My fallback suggestion was that the lawyers hire me, for a relative pittance, to do the grunt work at the same time that an experienced accountant was hired to look over my shoulder.

Instead, in their wisdom, they tapped the esteemed Big Five firm Arthur Andersen to run the whole show. Utilizing the same cookie-cutter methods that are used in other class actions for things like securities fraud and defective consumer products, the settlement class team proceeded to place a couple of those tiny-type ads in *The New York Times* and to set up a fancy website. But at least two problems became apparent.

The first problem was that the database at www.uncoversettlement.com, which was designed to tell authors whether they were eligible to submit claims, missed a significant number of the more than half-million articles allegedly infringed by UnCover during the period covered by the lawsuit. This was caused by a vagary of the online indexing system whose details need not concern you here.

Though no longer working for the class attorneys, I was distressed by the idea that a lot of my fellow writers might never be aware that they were eligible for settlement checks amounting to as much \$30,000 each. I pointed out this flaw to the lawyers and negotiated the authority to find as many of these lost authors as I could and to arrange for them to submit claims independent of the website engine. (I refused any compensation for this work.)

The second problem was, to put it bluntly, Arthur Andersen's incompetence. On at least one occasion, Andersen incorrectly told the lawyers that an author/claimant I'd sent to them was ineligible for a claim. In this instance, I was able to set the record straight by the claims deadline. It's impossible to say how many other slipups there might have been that I never knew about.

Class notice fell short of expectations. In fairness, Andersen wasn't the only reason. The other was the National Writers Union's president, who was too busy hoarding credit for his own case before the Supreme Court, *Tasini v. Times* (which wasn't a class action), to bother cooperating with another group "outside the box" that had already set an important precedent and extracted millions of dollars from a company trampling on writers' rights. Jonathan Tasini's vanity and Arthur Andersen's cluelessness combined to hold to fewer than 100 the number of writers collecting big-bucks settlement checks. Some dozens of members of another subgroup of the settlement class also got checks, most of

them amounting to around \$750.

Under the settlement terms, the plaintiffs' attorneys got \$2.9 million of the \$7.25 million settlement fund. The lawyers' costs included the fees they'd paid me on an hourly basis through the pre-settlement phases of the litigation; in two and a half years, these totaled about \$150,000. The leftover money was donated to charity.

And in return for its sterling performance during the few months of the end game of *Ryan v. CARL*, Arthur Andersen pocketed a cool \$500,000.

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The thwak! Deregulation of thump! Pro wrestling; the bureaucrats behind Hulk Hogan

Irvin Muchnick

The (THWAK!) Deregulation of (THUMP!) Pro Wrestling

The bureaucrats behind Hulk Hogan

Wahoo McDaniel's Indian-strap match against Gorgeous Jimmy Garvin started out as just another day at the office. When he was supposed to bleed (or, as they say in the business, "juice"), Wahoo slipped a razor blade out from under his wrist band. Then, while Gorgeous Jimmy and his valet, Precious, distracted the crowd by arguing with the referee, Wahoo nicked a clump of scar tissue near his own scalp. His brow gushed copiously, and the ten thousand fans at Veterans Stadium popped with excitement.

Wahoo had juiced himself dozens, maybe hundreds of times in his career, but never with such portentous consequences as at the Great American Bash in Philadelphia in July 1986. This time a piece of razor blade got lost in the gnarls of his scar tissue, where it stuck like a golf cleat to a wad of chewing gum. Wahoo, formerly a punishing linebacker in the old American Football League, worked the rest of the bout with the blade in his noggin. When he returned to the dressing room, the chairman of the Pennsylvania State Athletic Commission, James J. Binns, saw the mess at close range. Binns ruled that there would be no more juice at the Great American Bash, or ever again in his jurisdiction. "Some of these guys have foreheads that look like raised atlas maps," Binns later told *The Philadelphia Inquirer*.

For Virgil Runnels (better known to wrestling fans as Dusty Rhodes, the American Dream), the commissioner's edict was worse than a whack with archrival Ric Flair's gold championship belt. Rhodes is chief booker for the National Wrestling Alliance. While the World Wrestling Federation may sell itself as family entertainment, Dusty's minions appeal to the hard core.

Infuriated by Binns, Dusty Rhodes nevertheless took a back seat to his tag-team partners: the lawyers. Eighteen months later, after intense lobbying by the industry and a critical report by an audit committee of the state legislature, the American Dream won. The Pennsylvania House of Representatives voted to put the athletic commission in a permanent sleeperhold, thereby removing any bureaucratic impediments to razor blades. The state senate is expected to follow suit. Commissioner Binns has resigned. Pennsylvania thus seems poised to join Connecticut and Delaware as states that have deregulated wrestling in the past five years and swelled to 19 the ranks of the states in which the sport is unsupervised. Of course, in some states that might be an improvement. As wrestling spins and kicks its way into a \$300 million a year business, state

governments have created a bizarre regulatory maze that omits the rules most needed and erects ones where none are needed at all. But when it's the industry versus the regulators, it's usually the regulators that go down for the count.

The Ugandan Headhunter

You're probably wondering if pro wrestling is a true competition. No, Virginia, it is not. Its action, though dangerous and often surprisingly spontaneous, is choreographed. The matches themselves are a kind of brutal ballet in which the performers improvise the "spots" communicating through whispers and body language to create the illusion of violent combat until the scripted finish. Promoters call the shots, usually through backstage agents, who decide who gets pushed and who generally ensure that the feuds circulate with all the freshness of "Dallas" subplots.

The first pro wrestling exhibitions in America were run out of carnival tents in the nineteenth century. The sport spread to cities in the 1920s, becoming a sensation on television in the late forties and fifties with shows like "All-Star Wrestling" on the old DuMont network.

Even then, regulators were having trouble keeping the sport under control. Fortunately, riots haven't been a serious problem in New York since Antonino Rocca sparked a brawl at the old Madison Square Garden in 1957. An estimated 500 fans joined in that fray, which left two cops and several bystanders injured and 200 chairs broken. Prodded by a vigilant commission, the chastened promoters thereafter instituted the practice of blaring "The Star-Spangled Banner" over the public-address system at the conclusion of every controversial Rocca bout. While the partisans stood neutralized, security forces would spirit the bad guys out of harm's way.

One of those villains, Dick the Bruiser, kept getting into so many fracasas in New York State that in his words, "I was suspended longer than the Brooklyn Bridge." Years later, when I asked the Bruiser how he managed to get himself reinstated, he winked and replied, "I called my mother." Dick the Bruiser's mother, for the uninitiated, happened to be Indiana's Democratic National Committeewoman, Margaret Afflis Thompson.

Pro wrestling went into orbit in the brave new world of video. The current Barnum of Bounce is third-generation promoter Vince McMahon, hypemeister and head of the Connecticut-based World Wrestling Federation. He looks like Alfalfa from "The Little Rascals" might have had he pumped iron. He's also a marketing genius. Today the WWF generates more revenue from such sources as pay-per-view cable television (where viewers dole out cash for each show) as well as videocassettes, kids' dolls, and T-shirts, than it does from live ticket sales. Since the company is privately held it has not released its revenues. Its haul has been estimated at around \$150 million a year.

In most states boxing and wrestling have been lumped together in a peculiar regulatory scheme. The favored term, "athletic commission," overstates its purview. (More accurate is the name of Washington D.C.'s Boxing and Wrestling Commission--whose chairwoman, Cora Wilds, incidentally, resigned last year after reports of her doublebilling of expenses.) Across the country

commissions range from independent, governor-appointed supervisory panels to the cobwebbed corners of departments of state or labor or consumer affairs.

The commissions' promotion of safety standards for boxing is heavily subsidized by rassin'. In New York, for example, wrestling generated \$302,262 in 1987--almost three times as much as boxing. Even in California, where boxing events are staged more often than any other state, wrestling revenues last year brought in more than double those of the sweet science (\$271,806 to \$122,292) through a 5 percent tax on gate receipts.

Beyond tax collection, the standard justification for wrestling regulation comes from people like Marvin Kohn, deputy commissioner of the New York State Athletic Commission. Kohn argues that promoters have always wanted a government superstructure because "we lend credibility to their product."

In New York State, credibility seethes from part 225 of the athletic commission's rules. In Section 225.2 there's the concession that we're dealing with "exhibitions only." On the other hand, Section 225.11 asserts, that's no excuse for "unfair or foul tactics" such as "striking, scratching, gouging, butting, or unnecessarily punitive strangleholds." (Necessarily punitive strangleholds will always have their place.) Miscreants are cautioned that "unsportsmanlike or physically dangerous conduct or tactics" can result in disqualification. And let's not forget proper ring attire: fans of Kimala, the Ugandan Headhunter, and of Brutus (The Barber) Beefcake can sleep soundly knowing that the type and color of their trunks were approved by the commission, in accordance with Section 225.19.

The commission is charged with protecting the health and safety of its participants but doesn't neglect the financial protection of various hangerson. Take Jose Torres the \$68,000-a-year chairman, ex-light heavyweight boxing champ and Norman Mailer's pre-Jack Abbott literary protege. In New York, no wrestling takes place without the presence of ring inspectors, who get \$39 per event and are responsible, among other things, for making sure the corner turnbuckle pads are securely in place. Their service is greatly appreciated by George (The Animal) Steele, who as part of his act frequently lunches on them both during and after his bouts.

The Animal, a former Detroit high school teacher with a heart irregularity, is more leery of the official commission doctor, who checks the blood pressure of all wrestlers before they perform. A 1985 show at the Nassau Coliseum featured a steel-cage match between Captain Lou Albano, then 52 and grotesquely obese, and Classy Fred Blassie, the Hollywood Fashion Plate, then 69 and with an artificial hip that forced him to walk with the aid of a cane. Thanks to the attending physician, we have it on good authority that Albano's and Blassie's diastolic readings passed muster.

The wrestler's lobbyist

Other states set an equally inspiring example. In Maryland, wrestling promoters must set aside two ringside rows at every show for commission officials. In Missouri, the most heated issue is a ban against jumping off the top rope; to say the least, this prohibition cramps the style of Jimmy

(Superfly) Snuka, the acrobatic Polynesian whose coup de grace consists of diving onto his supine victim. In Oregon, they recently banned the blade; now when Portland fans clamor for blood, wrestlers simply do it "the hard way," grinding a knuckle into each other's foreheads or rubbing against ropes or ring posts.

In New Mexico, the blood-pressure tests are always a hassle because of the high altitude and spicy Mexican food. The big, wasted black man who bills himself as The Junk Yard Dog once flunked half a dozen times in Albuquerque before finally getting his pressure down to an acceptable level. Meanwhile, the show was juggled so JYD could go on later--making this the only known case of a wrestler's being switched from the semi-main to the main event because of concerns over his health.

In Pennsylvania, the Byzantium of wrestling regulation, the buckets of red blood are matched by rolls of red tape. Long before the Wahoo McDaniel contretemps, the World Wrestling Federation complained about an official ringside commission table, which always had to be covered with a white tablecloth. The table's sharp corners threaten to cause far more injuries than the cushioned mats that WWF wrestlers collapse on when they're tossed outside the ring. But if the commission folds, as is expected, so might the table.

In 1972 an overeager commissioner named Joe Cimino ordered the strict enforcement of all amateur-style rules. At a Pittsburgh show, his referee dutifully set about disqualifying wrestlers left and right for fake punches, hair-pulling, and use of the ropes; an hour's worth of scheduled matches lasted a mere 22 minutes. Since the show was being shot live for TV, this left 38 minutes, but those watching at home got a treat: an unrehearsed, honest-to-God, on-camera shouting match between Cimino and wrestler Bruno Sammartino.

So when the Pennsylvania athletic commission came up for review last year under a 1981 sunset bill, the wrestling community was only too eager to air its complaints. As it turned out, however, some of the best dirt came from people within the commission itself. The audit committee learned of turf battles between the executive director, a full-time staff official, and the commissioners, who were paid on a per diem basis to attend meetings and events but tried to direct the day-to-day operations. Further blurring the flow charts was a confusing district system, which had different commissioners enforcing different guidelines in each section of the state.

The auditors didn't go so far as to recommend abolishing the commission--only cutting the numbers of deputies and trimming its authority. But once their report reached the legislature, the World Wrestling Federation's savvy lobbyists pulled the levers on the fate of the beleaguered agency as expertly as Macho Man Savage throws a flying elbow. At a September 1987 show in Hershey, they handed out complimentary tickets, hors d'oeuvres, beer, and soda to the chairman of the state house Government Committee and more than 20 staff members of the Governor's Office of Legislative Affairs and the Department of State. Three months later the vote flattened the commission.

But it was the legislation's fine print that really rang the bell: not only was the state wrestling tax reduced from 5 percent to 2 percent, but the surety bond for promoters was raised from \$3,000 to

\$10,000. Dave Meltzer, publisher of the Wrestling Observer, an insider newsletter, notes that this last provision will have the effect of helping major promotions like the WWF and the NWA by shutting out smaller independent operators. "In other words, as usual, Vince McMahon got exactly what he wanted," Meltzer concludes. You better believe it.

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Stop the Trash Trucks: A *Tasini* Case Damage-Control Proposal

by Barbara Quint

July 16, 2001 — "If you can keep your head/when all about you men are losing theirs/and blaming it on you..." So begins Kipling's immortal advice to us all in "If—An Inspirational Poem." And now's the time to take that advice. Let's not panic here. Let's not take rigid, fixed battle positions and wait for victory or death. And above all, let's not get boxed into defining victory as unconditional surrender.

The Supreme Court's *New York Times Co., Inc., et al. v. Tasini et al.* case decision has tossed a bomb into the world of online content providers with a dead-center hit on the database aggregators and search services that carry full text. The decision clearly grants copyright ownership of the electronic reproduction of a freelance author's work to the author, not the publisher of the original print work, *unless* a contract exists between the author and publisher that clearly spells out the transfer of those electronic rights. This means that masses of online full-text articles licensed to database aggregators and, through them, to online host services and Webmasters, have become illegitimate, so to speak. The aggregators and search services and the publishers have been selling what they don't own, or at least don't have a right to sell.

When it comes to past liability, aggregators and search services have a parachute to protect their tender hides from the abyss yawning before them. For some years, contracts and licenses with publishers have contained a clause that, in one form or another, indemnifies the aggregator or search service by declaring that the publisher promises that it has the rights to license whatever it is licensing. Worst-case scenario: If the authors start hitting up the aggregators and search services for big damages, the online vendors could cross-sue the publishers for having gotten them into this trouble. Of course, at that point, the publishers would probably already be paying damages to freelance authors directly.

Record Removal

Within hours of the Supreme Court's June 25th *Tasini* decision, publishers began to make good on their threats and issued orders for search services to start stripping files of suspect material. Early this month, notices had begun appearing on DIALOG newspaper files, for example, warning of deleted records. In a Help News record, The San Jose Mercury News (File 634) and The Contra Costa Papers (File 645) noted: "Records not authored by staff members of The San Jose Mercury News have been removed. This deletion is universal in that all online providers ... are removing the same records from their respective databases." (Of course, such publication-specific warning notices would probably be hard to find on services like LexisNexis and Factiva that usually lump all their data into massive chunks.)

The New York Times Co., one of the defendants in the *Tasini* case, announced it was ordering the removal of 115,000 records from LexisNexis and other sources and shutting down access to all New York Times book reviews on its own <http://www.nytimes.com> Web site.

The decision clearly gave freelance authors electronic reproduction rights, providing they didn't have written contracts stipulating their concession. But I suspect that not all the authors who now have clear title to their work would want to exercise it by removing it from online full-text collections—with or without compensation. *The New York Times* even asked authors to contact them if they did not want their material removed. Of course, then the National Writers Union, plaintiff in the *Tasini* case, took out an ad urging writers to not take the *Times* up on that offer unless they got compensated.

