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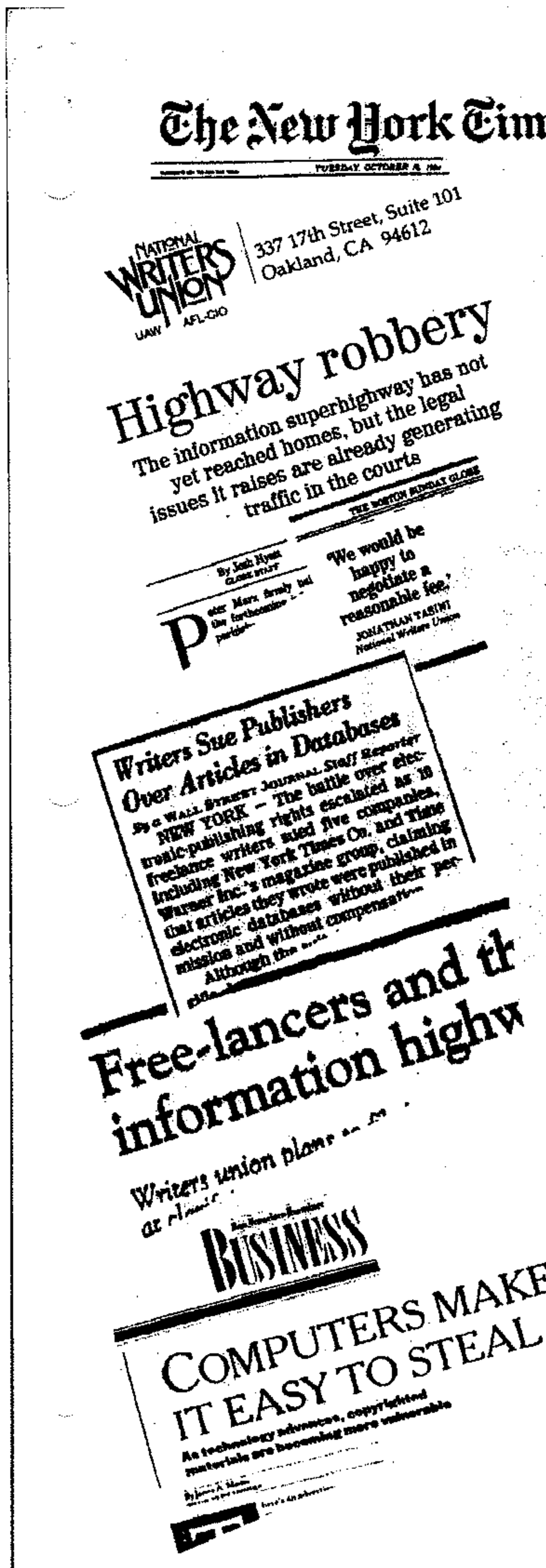
EXHIBIT A



The New York Times

TUESDAY, OCTOBER 4, 1994

NATIONAL WRITERS UNION UAW AFL-CIO
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

THE BOSTON SUNDAY GLOBE

By Josh Hyatt
GLOBE STAFF

Peter Mars firmly bel the forthcoming publi

'We would be happy to negotiate a reasonable fee.'
JONATHAN TASINI
National Writers Union

Writers Sue Publishers Over Articles in Databases

By a 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 th information highw

Writers union plans ... ar ...

BUSINESS

COMPUTERS MAKE IT EASY TO STEAL

As technology advances, copyrighted materials are becoming more vulnerable

# 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claims to slogans, facial and vocal likenesses, melodic snippets, genetic sequences, bits of mathematical reasoning, unpublished letters and the look and feel of software programs.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 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 boulevereement. 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 Ascap 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. □

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

EXHIBIT B

# 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.

# # #

EXHIBIT C

# 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

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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 fracases 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

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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 rasslin'. 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

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(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

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$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.



EXHIBIT D

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

**by Barbara Quint**

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*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.

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I, for one, am caught in a quandary. When I checked last year, I had over 600 articles in full-text on commercial services, a life's *oeuvre*. After eight hard-disk crashes on computers I have owned and discarded over the years, the only reliable backup system I have is the commercial online full-text services. Maybe I should sue if they try to remove my works due to *Tasini*. Or should I hold out for a lawsuit as a retirement bonus, an Acapulco Fun Fund? AAARRRGGGHHH!

## Preserve the Searchability of Full-Text Archives—Please!

However all this works out in the end, commercial services and publishers should follow two ironclad principles in establishing policies and procedures post-*Tasini*. One, don't make matters any worse than they have to be. Do no further harm. Two, protect the interests of users. In fact, all parties have an abiding investment to protect the interests of customers. Whether writer, publisher, aggregator, or search service, anyone who works in and lives off the traditional structure of the information industry should always remember that the real competition remains the Web itself—that and Ignorance.

If people come to find commercial sources unreliable, if addicts of the free and open Web find that services to which they pay top dollar cannot deliver what they have promised, if uncertain users seeking the comfortable security of an established brand-name publication find that publication cannot even maintain a reliable inventory of their own archives.... Well, how long before disenchanted, disillusioned (or should we say *re-illusioned*) users decide that they could do just as well floating across the Web picking up information as they go? If *The New York Times'* own Web site has lost all its book reviews, then why not use the ones you find on Amazon.com written by "real people," Amazon's customers? If the full-text collections of DIALOG and LexisNexis and Factiva and ProQuest and Gale Group's Infotrac keep getting smaller and smaller and the reliability of retrieval spottier and spottier, then why pay high rates? In fact, why sign up for subscription contracts at all? For "hit-or-miss" service, why not pay hit-or-miss usage-based charges?

Stop! Even though publishers and aggregators and search services no longer have the clear right to provide full-text articles as documents, that's no reason to strip the files completely of such unauthorized material. Let's consider an alternative that would protect the ultimate consumer as well as the future interests of all the creators and handlers of the material.

## Another Solution

Specifically, online commercial services and searchable database archives on publisher Web sites should continue to maintain the inverted file index terms and tags that identify material barred from full-text delivery by the *Tasini* decision. The inverted file indexes belong to the host services, regardless of the fact that all the terms were generated from text produced by authors, freelance or otherwise. If inverted file indexes remain complete and comprehensive, they could continue to identify relevant articles, at least by the information from those articles that's clearly *not* copyrightable—namely the bibliographic citations. They might even offer abstracts.

To those citations, the online hosts could append a notice indicating that this material has been blocked or removed due to *Tasini* restrictions. One would hope that the online notices would also recommend alternative routes to the documents. Such recommendations could extend over a wide range, from a relatively crude approach ("Call a librarian.") to the more profitable offer of document-delivery service ("We'll call a librarian for you.").

Just a reminder, in case anyone out there has forgotten how searchable archive databases come to be. A set of documents is submitted and logged into a linear file (i.e., a file that retrieves items as documents, often by an accession number). Once the linear file is created, search engine software processes the text to generate an inverted file index. In the case of full-text databases,

EXHIBIT E

that usually means taking every word in the text and tagging it by field (or segment) and position (for phrase searching) and linking it back to the full linear file document record. When users search, they only use the inverted file index until they create a set of search results. When they display all or part of the results, the system uses the list of identification links when it goes back to the original linear file to gather the documents.

In this proposal, the underlying inverted file index upon which the searching process rests would continue to retain all the index terms generated in the past by processing the full-text articles. But since no one could ever re-create a whole document from using the inverted file indexing, that indexing constitutes a new creation and one copyrighted to the online service. In fact, when documents get "withdrawn" from databases on online search services, usually that just means that someone has shut down the links between the inverted file index and the linear file containing the documents as documents. In most cases, services will only really eliminate discarded references when they conduct a major reload of the file.

Since bibliographic citations are *not* copyrightable, it should be comparatively easy for online hosts to pull up the references as part of a normal search. This way the searcher could at least scan the titles and dates and author names—or whatever—and make an educated guess whether the item might contain the exact material they need. Instead of getting a "document not available" message attached to an empty result document, the hosts would post "unavailable due to *Tasini* case restrictions" or something like that. But at least the searchers would know that their searching strategy touched all the records, even if they're not allowed to see all of the material in the retrieved records.

Some have proposed just leaving the citations in the database archives, but this would do very little good since the indexing would only retrieve from the tiny amount of data in citations. To do any good, the searchers would have to know so much about the target material that they'd probably have enough information to find it without a search.

## Un-Gored Oxen and Un-Gory Customers

What's the advantage to this alternative approach? First, last, and in between, it protects the interests of the users. And those interests will be strongly damaged if full processing of the *Tasini* decision goes through—more than some publishers and services seem to realize. For example, when The New York Times Co. announced that removal of some 115,000 articles from their electronic archives, including those found on LexisNexis, a company spokesperson attempted to reassure users by pointing out that this amounted to only 3 percent of its archive. Well, maybe that's true of a major publisher like the Times, but think about all those small trade press publishers, the ones with the inside track on industry and product developments. Do you really think all of them will have legalities neatly tied up and databases pristinely exempt from controversy? What good will an online search do a company executive, if all it retrieves are articles from major publisher sources?

Regardless of the specifics or even the quantities of omissions, that's not the point. When searchers use a database archive, they expect it to be as complete as possible. We all know that no full-text archive is really complete—no ads, usually no graphics, usually no letters to the editor, often no short news items, sometimes no columns. Nevertheless, we do rely on the service to provide a consistent level of coverage.

Say a client wants an article he or she knows appeared in a source. Well, clients often—did I say often?—I meant often get the source wrong. If you know that the type of material described doesn't fall into any of the categories for material left off-line, then you can argue with the client that you've done a comprehensive check for the relevant article and something's wrong. Either the client got the source wrong (most likely) or the material was never archived (e.g., it didn't

appear in a newspaper's "issue of record" edition). Whichever, when searchers start arguing with a client, they put their professional skills and the competence of the tools supplied by the vendors they've selected on the line. And as for end-users accessing files connected through an intranet, they won't even know they're wounded until the undertaker starts inserting the embalming fluid.

Searchers pay online commercial services top dollar not just for information, but for peace of mind about information. Now, not only will every search become a painful "I wonder what I'm missing" experience, but searchers will never even know for sure when they are *not* missing anything, or when a certain search strategy on a particular database did retrieve all the relevant material. I would hate to be the next salesperson from a commercial host to walk through the door of a client's office after that client has just spent an hour and a half paging through print, motoring through microfilm, or inching through indexes only to find that the online search he or she did in the first 5 minutes had been comprehensive after all—for once.

Here and now, I promise all commercial hosts and publisher Web sites that I, for one, will beat my drums as loud as I can beat them to tell all users everywhere—particularly those large intranet-based subscribers—to refuse to pay the same rates to full-text services that do not protect their interests as well as they can. Then, when contract renewal time comes around, it should be a whole new ballgame. I call on searchers everywhere who agree with this approach to send me e-mail messages **(bquint@mindspring.com)** of support. I promise to forward them on to the relevant executives at the online services.

And dear consumer readers, I also urge you to copy this article and forward it to all the representatives you know at all the full-text services you use with notes of support attached. *Do it now* before the trashing of online data has gone too far, before the databases you rely upon are damaged beyond repair. And if you see a database notification indicating withdrawals, contact the publisher and argue for reinstatement. If they tell you it's too late, question that opinion. Ask to talk with the techies or senior management.

## Why Wouldn't They?

Technically, this approach should be as doable as removing masses of information. The concerns might be political. Clearly, publishers and the information industry are heading toward the U.S. Congress for remedy. They will want the Congress to pass laws that overturn the *Tasini* decision. At the same time, authors also are not slow to approach Congress.

Nonetheless, as far as I can see, the damage-control approach suggested would pose neither an advantage nor a disadvantage to either side. If publishers and online hosts want to gain the advocacy of users by making them "feel the pain" of the *Tasini* case decision, then seeing *Tasini*-barred references pop up in search after search should help that goal. If authors want to prove to publishers and hosts that they are cutting off their noses to spite their faces by refusing to work out clearinghouse arrangements for electronic rights, then the statistics on how many times all parties lost sales due to *Tasini*-barred material should also help.

But more than anything, all parties involved in the provision of expensive published literature should remember that their greatest competitor is the open Web and their only hope of survival is a trusting, friendly customer base.

[Oh, by the way, at this year's Internet Librarian conference in Pasadena, California, the Southern California Online Users Group (SCOUG) will sponsor an evening session on November 6 entitled: "The *Tasini* Decision: Is This the End of Full Text as We Know It?" On the panel will be top executives from Dialog, Factiva, LexisNexis, Gale Group, and ProQuest, as well as Jonathan Tasini of the National Writers' Union. More important, in the audience, the panel will find users, users, and more users. I hope you can attend the whole conference, but if you cannot, join

EXHIBIT E

SCOUG **(http://www.scougweb.org)** and get a pass to the session plus a day pass to the exhibit hall. Did I mention that SCOUG doesn't charge membership dues? Well, now I have.]

*Barbara Quint, co-editor with Paula J. Hane for **NewsBreaks**, is editor in chief of **Searcher**, a columnist for **Information Today**, and a longtime online searcher. Her e-mail address is **bquint@mindspring.com***



EXHIBIT E

## Letter to the Editor
## Information Today; 9/1/2001

Barbara Quint's NewsBreak, "Stop the Trash Trucks: A *Tasini* Case Damage-Control Proposal" [see http://www.infotoday.com/newsbreaks/nb010716-1.htm as well as Quint's Online on page 8], is characteristically thorough and sensible. As a former assistant director of the National Writers Union and consultant to the plaintiffs' attorneys in *Ryan vs. CARL*--a class-action lawsuit whose $7.25 million settlement similarly turned on Section 201(c) of the Copyright Act--I have only one point to add.

Ms. Quint is right to insist that the information community hold database aggregators' feet to the fire by demanding an accounting of deleted content. This, however, is not a new problem brought about by the latest round of litigation results. As long ago as 1994, I was part of a writers union campaign called "Operation Magazine Index," through which we confronted, among others, Information Access Company (now Gale Group). Our experience was that when authors, individually or collectively, questioned the offering of their works in for-profit products, the operator simply deleted those articles. Sometimes the person registering the complaint was so informed; however, users never were. Indeed, this was a source of some frustration for us, since our objective was to spur comprehensive negotiations, not to turn databases into undisclosed Swiss cheese. We overestimated the conscience of the putative keepers of the historical record when it came to maintaining its integrity.

In the wake of *Tasini*, information consumers need to know that writers are not the enemy. There was a new revenue stream from which only publishers profited, without the permission of the rightsholders. We thought that was wrong, and Ruth Bader Ginsburg, Antonin Scalia, and five other justices agreed. As the American Library Association recognized, there is ultimately an overall benefit to public access in giving individual creators, as well as large corporations, the right to exploit previously published works in new media. Far from feeling compelled to charge every kind of user for every bit and byte, we are now simply free to choose to give our stuff away in appropriate circumstances--but from a foundation of dignity and respect.

Irvin Muchnick

Berkeley, CA



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