

# ON THE PERILS OF INADEQUATE ANALOGIES

DAN TAMMUZ<sup>1</sup>

## ABSTRACT

*Linking law is barely a decade old. Over the course of this short period, a wide variety of approaches have come to light. In fact, different jurisdictions have come to different conclusions regarding similar issues. Recently, there has been a new addition to the jurisprudence. A Texas holding established that linking to copyright-protected content violates copyright. This iBrief argues that the reasoning in this decision is flawed. The opposite conclusion should have been reached by applying straightforward copyright analysis and by looking to recent case law regarding hyperlinking.*

## INTRODUCTION

¶1 SFX Motor Sports (“SFX”) has been promoting professional Supercross racing events for over 20 years.<sup>2</sup> Supercross is “a competitive motorcycle racing event conducted at indoor stadiums in which contestants compete over a man-made dirt track that contains various jumps, bumps and hairpin turns.”<sup>3</sup> As part of SFX’s promotional efforts, the company produces live audio webcasts, which it makes available on its website.<sup>4</sup>

¶2 Robert Davis<sup>5</sup> ran SupercrossLIVE.com.<sup>6</sup> Davis provided “chat, statistical datas [sic], audio webcasts, video webcasts, and software solutions, offering enthusiasts and fans a web community via various sports centric Internet sites.”<sup>7</sup> SupercrossLIVE.com, founded in 2003, was one of

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<sup>1</sup> J.D. candidate at Duke University School of Law, 2008; B.A. in Economics, Johns Hopkins University, 2001.

<sup>2</sup> First Amended Complaint at 3, Live Nation Motor Sports, Inc. v. Davis, No. 3-06-CV-276-L, 2007 U.S. Dist. LEXIS 2196 (N.D. Tex. Jan. 9, 2007) [hereinafter Complaint].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 5. SFX’s website is accessible at <http://www.supercross.cc.com>.

<sup>5</sup> Davis is a *pro se* defendant.

<sup>6</sup> Defendant’s and Counter Claimant’s Response to Plaintiff’s Response to Defendant’s and Counter Claimant’s Motion for Summary Judgment at 2, Live Nation Motor Sports, Inc. v. Davis, No. 3-06-CV-276-L, 2007 U.S. Dist. LEXIS 2196 (N.D. Tex. Jan. 9, 2007) [hereinafter Response to Motion for Summary Judgment].

<sup>7</sup> *Id.*

these sites.<sup>8</sup> Among other content, Davis posted hyperlinks to SFX's audio webcasts on SupercrossLIVE.<sup>9</sup>

¶3 On February 13, 2006, SFX Motor Sports ("SFX") filed a complaint alleging four counts against Robert Davis.<sup>10</sup> Three counts pertained to trademark infringement and unfair competition due to improper trademark use.<sup>11</sup> The fourth count alleged copyright infringement.<sup>12</sup> The defendants counterclaimed, alleging trademark infringement.<sup>13</sup>

¶4 SFX's trademark allegations concerned the use of its logos on the SupercrossLIVE.com website.<sup>14</sup> Davis' trademark claim revolved around SFX's use of the phrase "Supercross Live" on its website—a phrase allegedly infringing on his claimed trademark of SupercrossLIVE.<sup>15</sup>

¶5 This iBrief will focus on a portion of the copyright infringement claim. SFX asserted that Davis "willfully copied, reproduced and distributed, and continue[s] to copy, reproduce and distribute SFX's Audio Web Casts . . . at Defendants' web site, *www.supercrosslive.com* . . ." <sup>16</sup>

¶6 On January 9, 2007, the United States District Court for the Northern District of Texas ruled on the matter.<sup>17</sup> Judge Sam A. Lindsay held that Davis "violated SFX's copyright by providing a link of its webcasts without authorization, and not for a protected 'fair use' purpose under the Copyright Act."<sup>18</sup> The analysis in the opinion can be said to be cursory at best.<sup>19</sup> It makes only passing reference to existing jurisprudence.<sup>20</sup> In fact, Judge Lindsay relies almost exclusively on an analogy to a case involving "unauthorized satellite transmissions of the

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 3.

<sup>10</sup> Complaint, *supra* note 2 (The defendants specified are Robert Davis doing business as Tripleclamps and *www.supercrosslive.com*. Plaintiff in this case is Live Nation Motor Sports, Inc. formerly known as SFX Motor Sports, Inc.).

<sup>11</sup> *Id.* at 7–11.

<sup>12</sup> *Id.* at 12.

<sup>13</sup> Answer to Complaint Denying Allegation of Trademark Infringement with Counterclaims at 7–8, *Live Nation Motor Sports, Inc. v. Davis*, No. 3-06-CV-276-L, 2007 U.S. Dist. LEXIS 2196 (N.D. Tex. Jan. 9, 2007) [hereinafter Answer to Complaint].

<sup>14</sup> Complaint, *supra* note 2, at 6.

<sup>15</sup> Answer to Complaint, *supra* note 13, at 7-8.

<sup>16</sup> Complaint, *supra* note 2, at 12.

<sup>17</sup> *Live Nation Motor Sports, Inc. v. Davis*, No. 3-06-CV-276-L, 2007 U.S. Dist. LEXIS 2196 (N.D. Tex. Jan. 9, 2007).

<sup>18</sup> *Id.* at \*14.

<sup>19</sup> *Id.* at \*6–14.

<sup>20</sup> *Id.*

National Football League's ("NFL") copyrighted weekly live broadcasts of football games to viewers in *Canada*."<sup>21</sup>

¶7 The first part of this iBrief scrutinizes the facts of the case in order to pinpoint the exact issue. Part II examines *Live Nation Motor Sports v. Davis*<sup>22</sup> using the bare copyright framework implemented by the holding. Part III analyzes the issue in the framework of existing case law pertaining to the legality of linking to content.

## I. WHAT HAPPENED?

¶8 Each party presents the relevant facts differently. In order to proceed with the analysis, it is important to be familiar with the parties' presentations of the matter and to disentangle the underlying facts.

¶9 SFX presents its understanding of the matter in paragraph 43 of the First Amended Complaint: "Initially, without the knowledge, and always without authorization or consent, of SFX, Defendants have willfully copied, reproduced and distributed, and continue to copy, reproduce and distribute SFX's Audio Web Casts . . . at Defendants' web site, www.supercrosslive.com even after receipt of written notice of their infringing activities."<sup>23</sup>

¶10 Davis' portrayal differs significantly:

Plaintiff is absolutely wrong in asserting that Defendant has ever rebroadcast copyright work [sic]. Defendant provides Internet visitors to SupercrossLIVE.com with a hyperlink, which launches the visitor's user-defined media player, initiating the audio feed directly from the source to the visitor's media player, independent of Defendants' website. A hyperlink is the most common and basic element of the Internet and can be thought of as a pointer. A pointer specifies for the user's computer, the destination file or web page to be displayed on user's computer. This is material in fact.<sup>24</sup>

¶11 Davis adds that he "did NOT and does NOT copy NOR reproduce Plaintiffs [sic] audio webcast original material, it is the same audio webcast link freely distributed by ClearChannel [the company from which Live

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<sup>21</sup> *Id.* at \*11 (referring to *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000)) (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> Complaint, *supra* note 2, at 12.

<sup>24</sup> Defendants and Counter Claimants' Brief in Support of Response to Plaintiffs' Brief in Support of Response to Defendants and Counter Claimants Motion for Summary Judgment at 2, *Live Nation Motor Sports, Inc. v. Davis*, No. 3-06-CV-276-L, 2007 U.S. Dist. LEXIS 2196 (N.D. Tex. Jan. 9, 2007) [hereinafter Supporting Brief].

Nation was spun off] executives and thousands of individuals upon thousands of websites worldwide.”<sup>25</sup>

¶12 Judge Lindsay, in an attempt to harmonize the diverging accounts, sees things in a different light.<sup>26</sup> He equates Davis’ admission of having a link on his website<sup>27</sup> with the streaming<sup>28</sup> of SFX’s “live webcast of [supercross] races on *his website* [Davis’ website] in ‘real time,’ . . . .” (emphasis added).<sup>29</sup>

¶13 Indeed, the logical gap that Judge Lindsay skipped in his attempt to reconcile the parties’ differing positions is the crux of this copyright infringement claim. If Davis copied the copyright-protected webcasts onto his website, then he would most likely be guilty of copyright infringement. However, the question is whether Davis would have been equally guilty for merely having provided a link to the copyright-protected content.

¶14 Instead of focusing on this question, the opinion endeavors to support its unlikely harmonization attempt by pointing out semantic inconsistencies in the defense.<sup>30</sup> The discrepancy stems from two statements in two separate documents. On the one hand, Defendants submitted a document stating that they “FLATLY DENY that they have ever had any involvement with a ‘Process Known as Streaming.’”<sup>31</sup> On the other hand, a previous document states that “TripleClamps [one of the defendants] . . . provides leading edge streaming technologies to millions of live audiences around the world for many of USA’s and Europe’s Major Amateur and Pro Events in Motocross, Arenacross, [and] Supercross . . . .”<sup>32</sup>

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<sup>25</sup> Defendant’s and Counter Claimant’s Motion to Quash Plaintiffs Motion for Partial Summary Judgment and to Quash Plaintiff’s Motion for Preliminary Injunction and to Quash Plaintiff’s Proposed Finding of Fact and Conclusion of Law in support of Motion for Preliminary Injunction, at 1, *Live Nation Motor Sports, Inc. v. Davis*, No. 3-06-CV-276-L, 2007 U.S. Dist. LEXIS 2196 (N.D. Tex. Jan. 9, 2007) [hereinafter *Motion to Quash*].

<sup>26</sup> *Live Nation Motor Sports, Inc. v. Davis*, No. 3:06-CV-276-L, 2007 U.S. Dist. LEXIS 2196, at \*6–7 (N.D. Tex. Jan. 9, 2007).

<sup>27</sup> *Id.* at \*7.

<sup>28</sup> *See Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 489 (3d Cir. 2003) (“The Internet . . . [is] a viable medium over which to transmit, in real time, sound recordings. This real-time transmission of sound recordings over the Internet is known as ‘streaming’ and ‘webcasting’ . . . .”).

<sup>29</sup> *Id.* at \*6.

<sup>30</sup> *Id.* at \*10 n.4.

<sup>31</sup> *Motion to Quash*, *supra* note 25, at 2.

<sup>32</sup> Answer to Complaint Denying Allegation of Trademark Infringement with Counterclaims, at 6, *Live Nation Motor Sports, Inc. v. Davis*, No. 3-06-CV-276-L, 2007 U.S. Dist. LEXIS 2196 (N.D. Tex. Jan. 9, 2007).

¶15 Judge Lindsay points out that we are faced with two irreconcilable statements made by the same party.<sup>33</sup> However, they do not both necessarily pertain to this case. Were we to assume that SupercrossLIVE.com does indeed stream content, it would not require the conclusion that this content includes SFX's copyright-protected webcasts. Indeed, SupercrossLIVE.com could lawfully stream a host of content—its own, or that which it has licensed from others.

¶16 Having dealt with the red herring that is the streaming matter, the remaining analysis is much cleaner. Davis had either copied the content to his website or he had not. As was stated, had he copied it, he would have been liable for copyright infringement without a doubt. Therefore, consistent with Davis' Motion to Quash, this iBrief will proceed under the assumption that a link to SFX's copyright-protected content was posted on Davis' website.

## II. COPYRIGHT ANALYSIS

¶17 *Live Nation Motor Sports* attempts to analyze the infringement using a standard two part test:<sup>34</sup> “the plaintiff [must] show ‘ownership’ of the material and ‘copying’ by the defendant.”<sup>35</sup>

¶18 The first prong of the test, ownership, was thoroughly investigated in the holding.<sup>36</sup> Questions were raised regarding the timing of the copyright protection;<sup>37</sup> the concern being that because the webcasts are broadcast live, they may not be registered immediately.<sup>38</sup> The plaintiff introduced documents that satisfied the court on this matter,<sup>39</sup> leading it to hold that SFX was in fact the copyright holder and thus the owner of the webcasts.<sup>40</sup>

¶19 While SFX satisfies the ownership requirement of the test, it is less than certain that SupercrossLIVE.com engaged in copying the material. Under the working assumption, Davis merely posted a link to SFX's webcasts; he did not copy them.<sup>41</sup>

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<sup>33</sup> *Live Nation Motor Sports, Inc. v. Davis*, No. 3-06-CV-276-L, 2007 U.S. Dist. LEXIS 2196, at \*10 n.4 (N.D. Tex. Jan. 9, 2007).

<sup>34</sup> *Id.* at \*7.

<sup>35</sup> *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir. 1991).

<sup>36</sup> *Live Nation*, 2007 U.S. Dist. LEXIS 2196, at \*9.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *See supra* Part I.

¶20 Judge Lindsay attempts to draw an analogy between the instant case and *National Football League v. PrimeTime 24 Joint Venture* (“NFL”).<sup>42</sup> The facts of the cases, however, differ too significantly to draw a helpful analogy. PrimeTime 24 Joint Venture (“PrimeTime”) is “a satellite carrier that makes secondary transmissions of copyrighted television networking to owners and renters of satellite dish antennae.”<sup>43</sup> This activity was done pursuant to a statutorily granted license.<sup>44</sup> However, in addition to retransmitting to the class of people specified by the license, PrimeTime also made such secondary transmissions “to its satellite subscribers in Canada.”<sup>45</sup> PrimeTime was found to have infringed on the NFL’s copyright.<sup>46</sup>

¶21 Judge Lindsay follows the *NFL* opinion and determines without further explanation that “the unauthorized ‘link’ to the live webcasts that Davis provides on his website qualifies as a copied display or performance of SFX’s copyrightable material.”<sup>47</sup> While the reasoning in *NFL* may be flawless, it is completely inapplicable to the instant case due to the extreme divergence of the fact patterns.

¶22 The two cases are not in the least bit comparable. The National Football League owned copyrights to the content in question.<sup>48</sup> PrimeTime engaged in capturing the signal and retransmitting it.<sup>49</sup> The Copyright Act has been found to encompass capturing a signal as a public display or performance.<sup>50</sup> Displaying a work means showing a copy of it.<sup>51</sup> This would involve copying the material. Thus, the two-part infringement test was satisfied—ownership and copying have been demonstrated.

¶23 Had SupercrossLIVE undisputedly copied the protected content onto its servers and then let the public stream the webcasts from them, a copy would have been made, the second prong of the test would have been satisfied and the cases would thus be analogous. The facts in *Live Nation* do not support such a conclusion. SupercrossLIVE.com did not capture the

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<sup>42</sup> *Live Nation Motor Sports, Inc. v. Davis*, No. 3-06-CV-276-L, 2007 U.S. Dist. LEXIS 2196, at \*11–12 (N.D. Tex. Jan. 9, 2007) (analogizing to *Nat’l Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000)).

<sup>43</sup> *Nat’l Football League*, 211 F.3d at 11.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 12.

<sup>47</sup> *Live Nation*, 2007 U.S. Dist. LEXIS 2196, at \*12 (analogizing to *Nat’l Football League*, 211 F.3d at 10).

<sup>48</sup> *Nat’l Football League*, 211 F.3d at 11.

<sup>49</sup> *Id.* at 12–13.

<sup>50</sup> *Id.* at 12.

<sup>51</sup> 17 U.S.C. § 101 (2006).

webcasts, but merely provided links to webcasts hosted by SFX.<sup>52</sup> An analogy of this would be PrimeTime notifying its viewers of the channel they should turn to in order to watch National Football League content.

¶24 Since Lindsay's *NFL* analogy should not stand, SupercrossLIVE.com cannot be said to have engaged in copying protected material. If the second prong of the infringement test is not satisfied, the claim cannot stand.

### III. LINKING JURISPRUDENCE

¶25 In *Live Nation Motor Sports v. Davis*<sup>53</sup> Judge Lindsay found it necessary to rely on *NFL*, a case having nothing to do with linking, but rather entirely about retransmission.<sup>54</sup> This should not have been the case. There already exists nearly a decade's worth of linking jurisprudence.<sup>55</sup> Granted, different areas have reached different conclusions, but such case law at least provides a framework with which to analyze these emerging issues. This would have been true, of course, had the issue (linking) been properly confined initially, without the analysis veering into neighboring matters that did not pertain to the litigation (streaming).<sup>56</sup>

¶26 Not all holdings are relevant. Indeed, they vary from state to state, and markedly from country to country. In addition to being unsettled, linking cases also highlight the differences in approaches to copyright protection between Europe and the United States.

¶27 An exceptional illustration of this is a recent holding issued by the Belgian Court of the First Instance in *Copiepresse v. Google, Inc.*<sup>57</sup> The court ruled that "Google had infringed the copyright of Belgian newspapers by publishing links to their stories on Google News."<sup>58</sup> The court found that because of Google News' presentation of news articles from Belgian sources, references made to the publisher, copyright protection and the reproduction permission were not evident.<sup>59</sup> Much of the analysis was based on an expansive interpretation of Article 10 of the European Convention on Human Rights.<sup>60</sup> The court held for the plaintiffs and

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<sup>52</sup> Supporting Brief, *supra* note 24, at 2.

<sup>53</sup> No. 3-06-CV-276-L, 2007 U.S. Dist. LEXIS 2196 (N.D. Tex. Jan. 9, 2007).

<sup>54</sup> *Id.*

<sup>55</sup> See *infra* note 65 (a 1996 case on linking).

<sup>56</sup> See *supra* Part I.

<sup>57</sup> *Copiepresse v. Google, Inc.*, No. 06/10.928/C (Feb. 2, 2007).

<sup>58</sup> *The World This Week: Business*, THE ECONOMIST, Feb. 17, 2007, at 9.

<sup>59</sup> *Id.*

<sup>60</sup> European Convention on Human Rights, Nov. 4, 1950, Europ. T.S. No. 5 ("The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in

ordered that Google not include their publications in Google News.<sup>61</sup> The two parties have since resolved their issues.<sup>62</sup> This very protective holding has taken the opposite attitude of cases built on similar situations that have been brought forward in the United States.<sup>63</sup>

¶28 This part of the iBrief will review some of the recent landmark holdings in the area of linking (“linking law”). It will assess their relevance to a proper in-depth analysis of the *Live Nation Motor Sports* case and apply them. The first subpart surveys the seminal cases in linking law, highlighting the different approaches taken early on. Subpart B emphasizes case law regarding deep-linking,<sup>64</sup> which is the issue at hand in *Live Nation Motor Sports*. The third subpart looks at the case in light of this jurisprudence.

### A. The Cross-Continental Origins of Linking Law

¶29 Linking law jurisprudence began with *Shetland Times v. Wills*.<sup>65</sup> The Shetland News (“the News”) and the Shetland Times (“the Times”) each ran a website with their articles.<sup>66</sup> In the event that the Times ran a story that the News was not covering, the latter would provide a hyperlink to the former’s story.<sup>67</sup> This practice triggered the lawsuit.<sup>68</sup> While part of the judgment was based on the copyright protection of the Times’ article titles, which were displayed along with the hyperlink on the News’ website,<sup>69</sup> Lord Hamilton’s reasoning is an interesting gauge of public opinion and perception of the Internet in 1996:

It was fundamental to the setting up by the pursuers of their web site that access to their material should be gained only by accessing their web *directly*. . . . There was, in the circumstances, no substance, in my view, in the suggestion that the pursuers were gaining an advantage by their newspaper items being made available more readily through the defenders’ web site.<sup>70</sup>

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a democratic society . . . for the protection of the reputation or the rights of others . . .”).

<sup>61</sup> *Copiepresse*, No. 06/10.928/C.

<sup>62</sup> Press Release, Google and Copiepresse. Joint Press Release (May 3, 2007) available at <http://www.copiepresse.be/cpgoogleanglais.pdf>.

<sup>63</sup> See *supra* Part II.A–B.

<sup>64</sup> See *supra* Part II.B. (defining “deep-link”).

<sup>65</sup> *Shetland Times v. Wills*, 1997 S.C. 316, 317–18 (Sess. 1996).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 318.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 319.

<sup>70</sup> *Id.* at 320 (emphasis added).

¶30 An interim interdict (similar to a preliminary injunction) was issued and the two parties ultimately settled the case, permitting the News to link to articles in the Times so long as the latter was identified as the “originator of the linked stories.”<sup>71</sup>

¶31 A holding often cited as a parallel to *Shetland Times*<sup>72</sup> in the United States was reached some seven years later in the pivotal case, *Kelly v. Arriba Soft*.<sup>73</sup> Arriba Soft was a search engine designed to find images using search words.<sup>74</sup> Arriba Soft downloaded graphics.<sup>75</sup> It then scaled them down in order to create thumbnails, proceeding to delete the original images.<sup>76</sup> After clicking on one of these thumbnails, which were shown after a search, the original image was displayed using in-line linking,<sup>77</sup> surrounded by information about it.<sup>78</sup> The court used a four-factor analysis to determine that this practice was justified by fair use.<sup>79</sup>

¶32 *Kelly v. Arriba Soft* has been read by some as very permissive.<sup>80</sup> A commentator notes that “[t]he decision wisely permits use of the content indexes and links that are typically used and needed in Internet searching and navigation.”<sup>81</sup>

¶33 *Perfect 10 v. Google*<sup>82</sup> is a more recent case based on similar facts. Perfect 10 is an adult magazine, which also operates a subscription website featuring its copyrighted images.<sup>83</sup> Google operates a search engine for

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<sup>71</sup> *Shetland Times v. Wills*, 1997 S.C. 316, 320 (Sess. 1996).

<sup>72</sup> *Id.*

<sup>73</sup> 336 F.3d 811 (9th Cir. 2003).

<sup>74</sup> *Kelly v. Arriba Soft*, 336 F.3d 811, 815 (9th Cir. 2003).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> “[An] in-line link instructs the user’s browser to retrieve the linked-to image from the *source* website and display it on the user’s screen, but does so without leaving the linking document.” *Id.* at 816(emphasis added) (referring to Stacey L. Dogan, *Infringement Once Removed: The Perils of Hyper-Linking to Infringing Content*, 87 IOWA L. REV. 829, 839 n.32 (2002)).

<sup>78</sup> *Kelly*, 336 F.3d at 815–16.

<sup>79</sup> *Id.* at 817–22. The court looked to the fair use factors specified in the Copyright Act (17 U.S.C. § 107 (2006)): (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and sustainability of the portion used; (4) the effect of the use upon the potential market for or value of the copyrighted work.

<sup>80</sup> Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 BERKELEY TECH. L.J. 1273, 1290 (2001).

<sup>81</sup> *Id.*

<sup>82</sup> 416 F. Supp. 2d 828 (D. Cal., 2006), *aff’d in part, rev’d in part*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

<sup>83</sup> *Id.* at 831–32.

images, similar to Arriba Soft's.<sup>84</sup> Clicking on a thumbnail loads a page with the upper frame<sup>85</sup> being Google's and the lower frame being the "original web page on which the original image was found."<sup>86</sup>

¶34 One of the claims raised was that by in-line linking to the original website, Google violated the copyright-holders' exclusive right to display their content.<sup>87</sup> The court implemented two tests to analyze this issue: the server test and the incorporation test.<sup>88</sup>

¶35 The server test defines "display" as "the act of *servicing* content over the web—*i.e.*, physically sending ones and zeroes over the internet to the user's browser."<sup>89</sup> The incorporation test defines "display" as "the mere act of *incorporating* content into a webpage that is then pulled up by the browser."<sup>90</sup> While deliberating, the court acknowledged that applying either test could lead to exploitation.<sup>91</sup> The court finally embraced the server test, which was proposed by Google.<sup>92</sup> Its reasoning in adopting this method was quite convincing: This test mirrors what happens on the technological level as people are liable solely for content on *their* servers; it protects search engines that may link to infringing material, since the search engines themselves do not house the material; it is easily applicable, as one looks merely to where the information is stored; the websites posting copyright-infringing material remain liable; and it is in harmony with the objectives of the copyright law, by "encouraging the dissemination of information," since it does not induce any reticence to linking.<sup>93</sup>

¶36 This reasoning, with respect to the in-line linking of images was affirmed when the case was recently appealed.<sup>94</sup>

### B. Deep-Linking

¶37 Having established something of a background of linking jurisprudence, this subpart focuses on the specific type of linking involved

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<sup>84</sup> *Id.* at 841.

<sup>85</sup> Sableman, *supra* note 80, at 560 (explaining framing as allowing "the operator of a website to divide a browser window into multiple, independently scrollable frames with different layouts, and to place separate documents, from different Internet sources, in each window").

<sup>86</sup> Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 833–34 (D. Cal., 2006).

<sup>87</sup> *Id.* at 838. See *supra* note 77 (defining "in-line link").

<sup>88</sup> Perfect 10, 416 F. Supp. 2d at 839–40.

<sup>89</sup> *Id.* at 839.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 839–43.

<sup>92</sup> *Id.* at 843.

<sup>93</sup> *Id.* at 843–44.

<sup>94</sup> Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 715–19, 733–34 (9th Cir. 2007).

in *Live Nation Motor Sports. v. Davis*. This type of practice is called “deep linking.” Commentator Mark Sableman lays a solid foundation for understanding the concept:

Most websites have a central “home” page to which all subsidiary pages are linked. Website publishers probably expect users to visit their site through this home page “front door,” and to move around the website using the website’s own links to subsidiary pages. With this expectation, many websites post introductory material—possibly including third-party paid advertisements, and special teasers and highlights relating to their own site—on that home page. . . . [A]nyone who reaches a subsidiary page may record the URL of that page and use it as a hyperlink, thus enabling others to by pass the website’s front door and go to the subsidiary page of interest. Such links are known as “deep linking” because they link directly to subsidiary page “deep” within a website.<sup>95</sup>

¶38 This explanation mirrors the facts of the *Live Nation Motor Sports* case. Davis posted a link on SupercrossLIVE.com to the webcasts, which were subsidiary pages on the SFX website.<sup>96</sup> This being the case, SFX is suing Davis in order to prevent him from engaging in deep-linking.

¶39 *Ticketmaster Corp. v. Tickets.com, Inc.*<sup>97</sup> is a case that directly involves deep-linking. Ticketmaster operates a website supplying basic information about events as well as the option of purchasing tickets to them directly through its services.<sup>98</sup> Tickets.com provides information about events, but does not necessarily sell tickets to them.<sup>99</sup> Because Ticketmaster has exclusive agreements with the events it carries, Tickets.com is not able to sell tickets for them.<sup>100</sup> In such cases, Tickets.com posts information about the event as well as a deep-link to an interior page on the Ticketmaster site where tickets can be purchased.<sup>101</sup>

¶40 The court concluded that hyperlinking is not a violation of the Copyright Act.<sup>102</sup> Initially, the opinion analogized copying event information and posting a hyperlink to the selling webpage to “taking historical facts from a work of reference and printing them in different expression.”<sup>103</sup> Judge Hupp continued the opinion, stating in no uncertain terms, that deep-linking is not a copyright violation since “no copying is

<sup>95</sup> Sableman, *supra* note 80 at 1291.

<sup>96</sup> Supporting Brief, *supra* note 24, at 2.

<sup>97</sup> No. CV 99-7654, 2000 WL 525390 (C.D. Cal. 2000).

<sup>98</sup> *Id.* at \*1.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at \*2.

<sup>103</sup> *Ticketmaster*, No. CV 99-7654, 2000 WL 525390 at \*2 (C.D. Cal. 2000).

involved.”<sup>104</sup> This statement was strengthened by a further analogy to the use of a library card index, which references items for fast and efficient access.<sup>105</sup>

¶41 In addition to the copyright infringement claim, Ticketmaster also raised a breach of contract claim.<sup>106</sup> While this does not pertain directly to the *Live Nation Motor Sports* analysis, it reflects the court’s attitude toward the entire matter. Ticketmaster noted among its terms and conditions that deep-linking was not permitted.<sup>107</sup> The court decided not to enforce these terms.<sup>108</sup>

### C. Reviewing *Live Nation Motor Sports, Inc. v. Davis*

¶42 Tim Berners-Lee, the man who developed the World Wide Web,<sup>109</sup> provides an interesting viewpoint. He maintains that “free linking lies at the heart of the Internet.”<sup>110</sup> Indeed, one of the prevailing theories behind Internet links is that they “serve an organizational and beneficial purpose.”<sup>111</sup> The present case illustrates this perception. Davis’ website was a source of information for Supercross fans.<sup>112</sup> It is only natural that he should supply them with suggestions of other places to access the information that he could not provide on his own.

¶43 Part II followed through a straightforward copyright infringement analysis of the case.<sup>113</sup> It established that SupercrossLIVE.com’s link to SFX’s webcasts did not infringe on the latter’s copyright.<sup>114</sup> This finding is supported by tracing through the jurisprudence discussed in Part III, while keeping in mind the facts of *Live Nation Motor Sports*.

¶44 A good starting point would look to *Perfect 10*.<sup>115</sup> SupercrossLIVE.com did not incorporate the material in its website.<sup>116</sup> This

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at \*3.

<sup>107</sup> *Id.*

<sup>108</sup> The reasoning behind the court’s decision was that there was no need to click, signifying agreement with them, and they were displayed in a location where the customer had to scroll down in order to find them. *Id.*

<sup>109</sup> Michael J. Santorelli, *Rationalizing the Municipal Broadband Debate*, 3 INFO. SOC. J. OF LAW & POL. 43, 51 n.33 (2007).

<sup>110</sup> Sableman, *supra* note 80, at 1275.

<sup>111</sup> Michael Dockins, Comment: *Internet Links: The Good, the Bad, the Tortious, and a Two-Part Test*, 36 U. TOL. L. REV. 367, 367 (2005).

<sup>112</sup> *See supra* ¶2.

<sup>113</sup> *See supra* Part II.

<sup>114</sup> *Id.*

<sup>115</sup> *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006). *See* discussion *supra* Part II.A.

would be a clear violation of SFX's exclusive rights stemming from its copyright on the content. Using the server test, the link directs visitors' browsers to SFX's site, where the content is accessed.<sup>117</sup>

¶45 Also, *Kelly v. Arriba Soft* was read to be permissive of links facilitating Internet navigation.<sup>118</sup> Davis describes SupercrossLIVE.com as providing Supercross "enthusiasts and fans a web community via various sports centric Internet sites."<sup>119</sup>

¶46 Looking specifically to the deep-linking issue raised in *Live Nation Motor Sports* begs drawing an analogy to *Ticketmaster v. Tickets.com*.<sup>120</sup> In the latter case, Judge Hupp asserted that deep-linking is not a copyright violation.<sup>121</sup> Furthermore, he likened the practice to facilitating reference, the way a library card index does.<sup>122</sup> Hyperlinks have repeatedly been considered as nothing more than a referencing tool.<sup>123</sup> Indeed, what could be more innocent and less infringing?

### CONCLUSION

¶47 Judge Lindsay admits that "[l]itigation over copyright protections for live internet webcasts has not made its way into controlling Fifth Circuit opinions."<sup>124</sup> This being the case, further investigation into existing jurisprudence on linking law in other jurisdictions should have made. Given the existing holdings regarding linking law, there was no reason to force the facts at hand into a badly fitting analogy constructed on the basis of a case dealing with satellite retransmission to Canada.<sup>125</sup>

¶48 Finally, however, the parties reached a settlement, pursuant to which a final consent judgment was issued on May 30, 2007.<sup>126</sup> Two weeks later, Davis' domain name was registered by Live Nation.<sup>127</sup>

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<sup>116</sup> See Supporting Brief, *supra* note 24, at 2.

<sup>117</sup> *Id.*

<sup>118</sup> Sableman, *supra* note 80, at 1290 (commenting on 335 F.3d 811 (9th Cir. 2003)).

<sup>119</sup> Response to Motion for Summary Judgment, *supra* note 6, at 2.

<sup>120</sup> *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-7654, 2000 WL 525390 (C.D. Cal. 2000). See discussion *supra* Part II.B.

<sup>121</sup> *Id.* at \*2.

<sup>122</sup> *Id.*

<sup>123</sup> Dockins, *supra* note 111, at 382.

<sup>124</sup> *Live Nation Motor Sports, Inc. v. Davis*, No. 3-06-CV-276-L, 2007 U.S. Dist. LEXIS 2196, at \*11 (N.D. Tex. Jan. 9, 2007).

<sup>125</sup> *Id.* at \*11-12 (citing *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000)).

<sup>126</sup> Final Consent Judgment, *Live Nation Motor Sports, Inc. v. Davis*, No. 3-06-CV-276-L, 2007 U.S. Dist. LEXIS 2196 (N.D. Tex. Jan. 9, 2007).

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<sup>127</sup> As revealed by a whois search on [supercrossLIVE.com](http://supercrossLIVE.com) on Aug. 31, 2007.