Viacom International, Inc. v. Youtube, Inc. Doc. 42 Att. 1

Nos. 10-3270 & 10-3342

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VIACOM INT'L INC., et al. Plaintiffs-Appellants, v. **YOUTUBE, INC., et. al.,** Defendants-Appellees.	)	On Appeal from the United States District Court for the Southern District of New York No. 1:07-CV-2103 The Honorable Louis L. Stanton, United States District Judge
THE FOOTBALL ASSOCIATION PREMIER LEAGUE LTD., et al. Plaintiffs-Appellants, v. **YOUTUBE, INC., et. al.,** Defendants-Appellees.	)	On Appeal from the United States District Court for the Southern District of New York No. 1:07-CV-03582 The Honorable Louis L. Stanton, United States District Judge.

APPELLEES' MOTION TO CONSOLIDATE APPEALS

Pursuant to Fed. R. App. P. 3(b)(2), Defendants/Appellees YouTube, Inc., YouTube, LLC, and Google Inc. ("YouTube") respectfully request that the Court consolidate the following two cases for appeal: *Viacom International Inc., et al. v. YouTube, Inc., et al.*, No,. 10-3270 ("the

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Viacom case"); and *The Football Association Premier League Ltd, et al. v. YouTube, Inc., et al.*, No. 10-3342 ("the *Premier League* case"). Both appeals present the same legal questions, arise from the same district court proceeding, and the plaintiffs in both cases are appealing from the same ruling. Consolidating the cases for briefing and argument would spare the parties needless duplication of effort and make the Court's consideration of these appeals easier.

The *Viacom* case and the *Premier League* case were both filed in the Southern District of New York in 2007. Plaintiffs in both cases alleged that their copyrighted works had appeared without their consent on the YouTube service and brought claims against YouTube (and its parent company Google) for direct and secondary copyright infringement. Because the two cases raised substantially the same issues, the district court consolidated them for discovery pursuant to the parties' stipulation. Documents produced in one action were deemed produced in the other; depositions taken in one were deemed taken in the other; and interrogatories answered in one case were deemed answered in the other.

Summary judgment proceedings were similarly coordinated. The parties (and the district court) agreed that the plaintiffs in the two cases would have a total of 100 pages for their opening briefs, with 65 pages allocated to Viacom and 35 to the putative class. YouTube, in turn, was allocated 100 pages for a single opposition brief covering both the *Viacom* case and the *Premier League* case (and 100 pages for its own summary judgment brief that applied to both cases). When the district court denied plaintiffs' motions for summary judgment and granted YouTube's motion, it issued a single opinion and order that covered both cases. Final judgment in both cases was entered on August 10, 2010.

The *Viacom* plaintiffs filed their notice of appeal on August 11, 2010. The *Premier League* plaintiffs filed their notice of appeal on August 12. Plaintiffs in both cases are seeking to overturn to the same June 23, 2010 opinion and order. As confirmed by their "Form Cs" (which describe the two cases as "related"), the issues that Viacom and the Premier League propose to raise on appeal are virtually identical. The question presented in both appeals is whether the district court correctly granted summary judgment to YouTube (and denied summary judgment to the plaintiffs) on the ground that YouTube is protected by

the "safe harbor" of the Digital Millennium Copyright Act, 17 U.S.C. § 512(c). That question turns on issues of law and fact that are the same (or substantially the same) in both cases. Any differences between the claims and issues in the two cases are minor and should not impede their consolidation for briefing, argument, and decision.

For the briefing, YouTube has proposed a form of consolidation that would mirror what was done in the district court on summary judgment. Under that proposal, appellants in the two cases would be jointly allotted a number of words for their opening briefs equal to the number of words allotted to YouTube for its opposition brief. Appellants could allocate those words between themselves as they choose, and would be free to file separate briefs. Oral argument time could be allotted in a similar manner. Consolidation along these lines would minimize the burdens on this Court and on the parties, as well as their potential amici. It would minimize the amount of repeated arguments and make it easier for the Court to decide the issues. It would not result in any delay; both appeals were only recently filed and no briefing schedule has been set in either case.

The parties discussed YouTube's proposal at the recent CAMP conference. Counsel for the plaintiffs have indicated that they do not oppose some form of consolidation—indeed, the parties have agreed to file a single joint appendix for both appeals—but plaintiffs have objected to consolidated briefing and argument. Appellants' position appears to be that they should file separate briefs "of customary length" and, after the opening briefs are filed, YouTube should then move, if it wishes, for permission to file a single (oversized) opposition brief. That approach seems inefficient and needlessly cumbersome. There is no reason why the length and nature of the briefs that will be filed in these cases should not be resolved in advance of the opening round of briefing. YouTube believes that that its proposal is the most sensible and fair to the Court and the parties. To the extent, however, that the Court is not inclined to consolidate these cases in the manner suggested above, YouTube moves, under Local Rule 27.1(e), for permission to file a single brief not to exceed 28,000 words covering both appeals rather than filing separate 14,000-word briefs in each case. Counsel for appellants have indicated that they would not oppose YouTube's alternative request.

CONCLUSION

For the foregoing reasons, YouTube respectfully asks the Court to consolidate the *Viacom* case and the *Premier League* case for briefing and oral argument. In the alternative, YouTube moves for permission to file a single brief in both cases not to exceed 28,000 words.

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s/ Andrew H. Schapiro

David H. Kramer
Bart E. Volkmer
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300

Andrew H. Schapiro
A. John P. Mancini
Brian M. Willen
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Attorneys for YouTube, Inc.

CERTIFICATE OF SERVICE

I certify that on October 5, 2010, I caused copies of this motion to be sent, by first class United States mail and by electronic mail, to the following:

Paul M. Smith
William H. Hohengarten
Scott B. Wilkens
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, D.C. 20001
(202) 639-6000
psmith@jenner.com
whohengarten@jenner.com
swilkens@jenner.com

Stuart J. Baskin
John Guelli
Kirsten Nelson Cunha
SHEARMAN & STERLING LLP
599 Lexington Ave
New York, NY 10023
(212) 849-4000
sbaskin@shearman.com
jgueli@shearman.com
kirsten.cunha@shearman.com

Susan J. Kohlmann
JENNER & BLOCK LLP
919 Third Ave.
New York, NY 10022
(212) 891-1690
skohlmann@jenner.com

Theodore B. Olson
Matthew D. McGill
GIBSON DUNN
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 955-8668
tsolson@gibsondunn.com
mmcgill@gibsondunn.com

Charles S. Sims
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
(212) 969-3000
csims@proskauer.com

John C. Browne
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 55401400
johnb@blbglaw.com

s/ Andrew H. Schapiro
Andrew H. Schapiro