

depart from the briefing conventions set forth in the Federal Rules of Appellate Procedure. In its motion, YouTube proposes that the Court allocate to Viacom and the Class Plaintiffs-Appellants in the *Premier League* case (“the Class”) a fixed number of words for them to divide amongst themselves for their opening briefs and to provide YouTube the same fixed sum for its opposition brief. In the alternative, even before seeing the opening briefs, YouTube moves for permission to file a single brief not to exceed 28,000 words covering both appeals.

The *Viacom* and *Premier League* appellants do challenge the same district court ruling, and the appeals do therefore have some commonalities. That might suggest that a single panel should consider the two appeals in tandem.¹ But it does not recommend the manner of consolidation that YouTube suggests.

Contrary to YouTube’s contentions, the factual records and legal issues in the separate proceedings are far from identical. Most obviously, Viacom moved to invalidate YouTube’s reliance on the statutory safe harbor in the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512(c), and moved for summary judgment on YouTube’s liability for copyright infringement. The Class, by contrast, sought summary judgment solely on the question whether YouTube qualified

¹ To the extent the Court concludes that consolidation of some form is necessary to permit a single panel to consider the *Viacom* and *Premier League* appeals together, Viacom has no objection to that form of consolidation.

for the DMCA safe harbor. Although both appellants seek to overturn the district court's ruling on the applicability of the DMCA defense, Viacom also intends to appeal the denial of its infringement claims as well.

Beyond that, Viacom and the Class claim infringement of different copyrighted works—a difference that is reflected in the separate evidentiary records in the two district court proceedings. And YouTube has behaved differently toward Viacom and the Class with respect to negotiating licenses of the works in this suit and deploying content identification tools.

Given these considerable factual and legal differences, Viacom opposes YouTube's proposal to have Viacom and the Class jointly brief their separate appeals or share the length of a single brief. Under Federal Rule of Appellate Procedure 32(a)(7), an appellant is permitted to file an opening brief not to exceed 14,000 words, and the Rules contemplate that this will be the procedure even “[i]n a case involving more than one appellant . . . including consolidated cases.” Fed. R. App. P. 28(i) (permitting, but not requiring, a party to join or adopt by reference another's brief). YouTube has not explained how administering these appeals in accordance with the Federal Rules will cause it any prejudice.

YouTube's proposal to depart from those Rules is certain, on the other hand, to prejudice the appellants, coming as it does almost two months into the briefing schedule. The appellants filed their separate notices of appeal in August. Consis-

tent with Local Rule 31.2(a)(1)(A), the appellants each requested that their opening briefs be due December 3, 2010. Far from minimizing the burdens on the parties, consolidation of the appeals at this juncture would require Viacom to reassess strategic decisions relating to its brief and require significant negotiations and coordination with the Class. And that prejudice, of course, is amplified by the numerous aforementioned differences between Viacom’s appeal and that of the Class.

As a matter of fairness and efficiency, Viacom proposes that the appellants should be permitted to file their separate briefs in compliance with the Federal Rules of Appellate Procedure as planned on December 3. If, after reviewing the briefs of the two appellants, YouTube wishes to file a “disfavor[ed]” motion to file an oversized opposition, it can state its “reasons for exceeding” the length permitted by the Federal Rules of Appellate Procedure. Local Rule 27.1(e).²

² YouTube’s further request for judicial relief requiring the appellants to divide a jointly allocated amount of time for oral argument is premature. *See* Local Rule 34.1(d).

CONCLUSION

For the foregoing reasons, Viacom respectfully requests that the Court (1) deny with prejudice YouTube's motion to consolidate the appeals, and (2) deny without prejudice to re-file YouTube's motion for permission to file an oversized opposition brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of October, 2010, a true and correct copy of the foregoing Appellants' Opposition to the Appellees' Motion to Consolidate Appeals was served on the following via CM/ECF pursuant to Local Rule 25.1 (h)(1) & (2) and via first class mail.

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