

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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THE FOOTBALL ASSOCIATION	:	
PREMIER LEAGUE LIMITED, et al.,	:	
	:	Case No.: 10-3342
Plaintiffs-Appellants,	:	
	:	
v.	:	
	:	
YOUTUBE, INC., et al.,	:	
	:	
Defendants-Appellees.	:	
	:	
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**APPELLANTS’ OPPOSITION TO APPELLEES’ MOTION TO
CONSOLIDATE**

Plaintiffs/appellants (“the *Premier League* appellants”) oppose defendants/appellees’ motion to consolidate this appeal (“the *Premier League* appeal”) with the appeal in *Viacom International, Inc. et al., v. YouTube, Inc. et al.*, No. 10-3270 (“the *Viacom* appeal”) to the extent that consolidation would require the appellants in the two underlying cases to share the page or type-volume limitations that a single appellant would have under F.R.A.P. 32(a)(7), or to share the time for oral argument that a single appellant would be granted.

The two appeals involve two separate sets of plaintiffs/appellants, represented by different counsel, with different facts and different arguments

in the court below and on appeal, and the cases were not consolidated below (discovery was coordinated). The Premier League appellants do not otherwise oppose consolidation (to the extent that it would entail a single joint appendix or arguments in tandem), and agree that coordination between the two appeals to that extent is appropriate. But while the *Premier League* and *Viacom* appellants intend to file a single joint appendix, each of those two sets of appellants are entitled to their own brief and reply brief under the rules at the customary lengths provided for in Fed. R. App. P. 32(a)(7), and to argue their own appeals.

We also do not understand why defendants/appellees (“YouTube”) need to decide now, in advance of seeing the briefs to be filed by appellants in these cases, how long a brief they will need to respond. If YouTube decided, on reading appellants’ briefs, that more length was needed, Local Rule 27.1(e) provides an orderly procedure for making a motion for a longer brief up to 14 days before their brief is due, and that would seem the appropriate way to proceed. Although we are not opposed to YouTube filing the same answering brief in both appeals, there is no basis for concluding at this stage that they should be entitled to file a **28,000 word** response, double the customary length.

I. The cases should not be consolidated in the manner proposed by YouTube

YouTube exaggerates the extent to which the cases below were coordinated. Although the *Premier League* case and the *Viacom* case were coordinated for purposes of discovery, they were never consolidated by the district court, and YouTube itself never made any attempt to consolidate them. The cases proceeded as two separate district court proceedings. The parties coordinated the timing of the summary judgment motions in the two cases, and shared some of the evidence submitted on the motions, but the motions themselves were not consolidated – the *Premier League* and *Viacom* plaintiffs, who were and are separately represented, filed separate summary judgment motions, and filed separate oppositions to YouTube’s summary judgment motion. The separate summary judgment motions and oppositions were not made on identical grounds, and the plaintiffs in the two respective cases presented different evidence and different arguments. Additionally, although the district court wrote a single double-captioned decision in both cases – a decision that, other than in the caption, does not once mention the *Premier League* plaintiffs or any of the evidence or Rule 56.1 statements they submitted – the *Premier League* and *Viacom* plaintiffs/appellants filed separate notices of appeal and separate pre-argument statements on appeal in this court.

YouTube's proposal to now consolidate the two cases on appeal therefore does not mirror what happened in the court below, and would prejudice the *Premier League* appellants' rights on appeal. YouTube's motion emphasizes that the parties in both cases agreed in the court below to a single stipulation concerning page limits for summary judgment briefing. This stipulation accommodated YouTube's desire to submit a single summary judgment brief (in support of their motion and in opposition to plaintiffs' motions) in both cases. However, the stipulation gave the *Premier League* plaintiffs the right to file a separate full-length brief – 35 pages – in support of our motion, and a separate full-length brief in opposition to YouTube's motion. In contrast to this stipulated arrangement, and transparently for tactical advantage, YouTube now proposes forcing the *Premier League* and *Viacom* appellants to share a single full-length brief. Additionally, the Premier League and Viacom plaintiffs submitted separate requests for oral argument to the district court (the district court rendered its decision without ever hearing oral argument). However, notwithstanding the clear policy of Second Circuit Local Rule 34.1, YouTube now seeks an order, before any briefs are filed, forcing the *Premier League* and *Viacom* appellants to share their oral argument time.

YouTube's motion provides no basis for now restricting the *Premier League* appellants' right and ability to fully present their appeal. That the district court chose not to address the *Premier League* appellants' evidence is no reason to deny them the due opportunity and space to show why that extensive evidence warranted denial of YouTube's summary judgment motion.

Accordingly, YouTube's motion should be denied, and the *Premier League* appellants should be able (as they are entitled under the rules) to submit a separate brief and reply brief of the customary lengths as provided for in Fed. R. App. P. 32(a)(7).

As discussed at the joint CAMP conference for both appeals, and subsequently agreed by the parties in both appeals, the *Premier League* appellants and the *Viacom* appellants intend to submit a single joint appendix, and we understand that YouTube is agreeable to that proposal. We intend to file soon a motion to permit that, and the filing of electronic briefs that will hyperlink record citations to the record. We also believe it would be appropriate for this court to hear both appeals at the same time.

II. YouTube should not be entitled to submit an oversized brief that is double the customary length

YouTube's motion, in the alternative, for permission to file a single 28,000 word answering brief in both appeals should also be denied. The

Premier League appellants will not be opposed to YouTube exceeding, to a reasonable extent, the customary 14,000-word length, if, after reading the appellants' briefs, YouTube concludes that it needs to file a single answering brief for the two appeals and needs more space. But the rules already provide for YouTube to make a motion for an oversized brief at the appropriate time, rendering the present motion premature. Certainly there is no basis now for concluding that YouTube will need a 28,000 word brief, which would run more than 100 pages and be grossly lopsided relative to the customary 14,000-word brief that the *Premier League* appellants are entitled to submit. (Given YouTube's position that, from its perspective, the issues in both appeals are the same, a brief of customary length should be adequate, and YouTube should not in any event require **double** the customary length to adequately respond to appellants' arguments.)

Although we think it more appropriate for YouTube to make any motion for a single oversized brief only once it has seen appellants' briefs, if the court wishes to enlarge YouTube's brief now, a single brief that is no more than 1.5 times the customary length (*i.e.*, 21,000 words) would provide YouTube with space more than sufficient to respond to the arguments that appellants will raise, but not hugely disproportionate relative to the appellants' allotments.

CONCLUSION

For the reasons above, YouTube's motion should be denied to the extent that consolidation would require the appellants in the two underlying cases to share the page or type volume limitations generally afforded appellants. YouTube's motion for permission to file a 28,000 word brief should also be denied. Oral argument should be addressed by the panel in due course in accordance with Second Circuit Local Rule 34.1.

New York, New York
October 14, 2010

Respectfully submitted,

/s/Charles S. Sims

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v.	:	CERTIFICATE OF SERVICE
	:	
YouTube, Inc., et al.,	:	
	:	
Defendants-Appellees.	:	
-----	X	

I, Charles S. Sims, hereby certify under penalty of perjury that on October 14, 2010, I caused a copy of appellants' Opposition To Appellees' Motion To Consolidate to be filed electronically. Notice of these filings will be sent by email to all parties through the operation of the court's electronic filing system. Parties may access these filings through the court's system.

Dated: 10/14/10

/s/ Charles S. Sims

Charles S. Sims