Analysis Viacom has launched a $1bn lawsuit against YouTube and its owners Google over copyright infringing videos hosted by the site. The case could test the limits of the 'safe harbor' protections for ISPs and influence other user-generated content sites.

The entertainment giant said that its clips have been viewed more than 1.5 billion times without its permission and has sued the search giant and its video sharing subsidiary in a New York court for "massive international copyright infringement".

If the case goes to trial it is likely to test the limits the Digital Millenium Copyright Act (DCMA) of 1998. Google claims 'safe harbor' status for YouTube, which is a DMCA protection designed for search engines, web hosts and ISPs to shield them against liability for third party copyright infringements. Similar protections exist in European laws.

The safe harbor was designed to protect such companies from having to monitor the activity of every internet user, something which was recognised as impractical. These companies do not have to prevent illegal use of their services pro-actively, but when properly notified that they host infringing material they must "expeditiously" remove or disable access to that material. There is presently no clear judicial authority on the speed of reaction that qualifies as expeditious under the DMCA.

YouTube was built as a way of sharing videos made by users themselves, but a vast number of the videos posted and viewed are not created by the posters but are clips of television shows and music videos whose copyright belongs to entertainment corporations.

YouTube and other sites which allow users to post material for sharing rely upon the 'safe harbor' provisions of the DCMA for their own protection. The Viacom case will test that protection.
"YouTube is a significant for-profit organisation that has built a lucrative business out of exploiting the devotion of fans to others’ creative works in order to enrich itself and its corporate parent, Google," said Viacom in its suit. "Their business model, which is based on building traffic and selling advertising off of unlicensed content, is clearly illegal."

"In fact, YouTube strategy has been to avoid taking proactive steps to curtail the infringement on its site, thus generating significant traffic and revenues for itself while shifting the entire burden – and high cost – of monitoring YouTube on to the victims of its infringement," said Viacom.

Though some observers have predicted a pay-off for Viacom, which owns MTV, VH1, Comedy Central and Nickelodeon, Google said it will defend its DCMA protection.

"We will never launch a product or acquire a company unless we are completely satisfied with its legal basis for operating," Alexander Macgillivray, Google’s senior product and intellectual property counsel, told news agency Reuters. "This is an area of law where there are a bunch of really clear precedents, so Amazon and eBay have both been found to qualify for the safe harbor and there are a whole bunch more," he said. "We will continue to innovate and continue to host material for people, without being distracted by this suit."

Viacom recently demanded that YouTube remove 160,000 clips which it said violated its copyright. YouTube removed the clips, but reports emerged that users immediately re-uploaded many of the clips almost instantly.

There is a requirement in the DMCA that, if a subscriber or account holder is found to repeatedly infringe copyright, a company seeking to rely on the safe harbor provisions must remove that person from its network. This termination policy must also be written into the terms of use.

YouTube's conditions comply with this requirement. They state: "YouTube will also terminate a User's access to its Website, if they are determined to be a repeat infringer. A repeat infringer is a User who has been notified of infringing activity more than twice and/or has had a User Submission removed from the Website more than twice."

Repeat infringements

The DMCA does not specifically address repeat infringements by different individuals, one of the biggest problems for content owners that object to their material appearing on YouTube. But it does provide an option for "such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose."

Struan Robertson, a technology lawyer with Pinsent Masons and editor of OUT-LAW.COM said: "It's possible that if Viacom's case goes to trial, new guidance will be given on the safe harbor provisions and the expectations for sites that are built on user-generated content."

A Supreme Court ruling against file-sharing firms Grokster and Streamcast in 2005 means that if Viacom can show that YouTube promoted the infringement of copyright by users, it would likely be
liable for that infringement. But Robertson said this may be difficult to establish. "There are clear and prominent warnings in YouTube's upload process, not just its small print, that tell users not to upload copyright infringing materials."

"The problem is that users can ignore the warnings," he said. "YouTube and Google know that and have been working on filtering technology to reduce the infringing material on its site – but clearly not fast enough for Viacom."

"Viacom will no doubt argue that YouTube's failure to identify and block infringing uploads is tantamount to promoting them – and that would be a worrying result for any user-generated content site," he said.