Google and the rocks in the web's safe harbours

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Microsoft executives recently announced that, unlike Google, they respected intellectual property rights.

Google's crime? Digitising books to make them searchable, relying partly on a "fair use" defence to claimed copyright infringement. Also, Microsoft faulted Google for buying YouTube, saying that site was dependent on copyright infringement for its value. Google denies it, saying that much of the material is user-generated content or privileged fair use, while the remainder is covered by a legal "safe harbour" for sites that allow individuals to upload material at will and comply with "take-down" notices sent by copyright owners. Viacom was unconvinced. It has just sued YouTube for $1bn (£516m). Yet Microsoft was also in the news because a federal jury last month handed down a $1.52bn damage judgment against it for patent infringement. Does Microsoft scoff at intellectual property law too, then? It denies liability, saying the decision could affect hundreds of other companies and prevent innovation.

When we are dealing with intellectual property, how do we know who is a trespasser and who is a greedy landowner trying to enclose the public right of way? First lesson, analogies to physical property are dangerous. Most of these disputes are about whether a new market, enabled by technology, should lie inside or outside the scope of the artificial monopoly conferred by the intellectual property right. Because these rights are created for a purpose - to foster and disseminate science, innovation and culture - there are inevitable "should" questions involved. Should copyright make it illegal for a search engine to index my book (which requires making a copy of it) if only a small fragment is available to a searcher and publishers can request removal? Google has a very good argument that copyright should not and does not make that illegal.

But what about YouTube? Because YouTube gets advertising revenues from people who come to the site to see videos - licit and illicit - Viacom wants an interpretation of the safe harbour that in effect puts the burden on YouTube constantly to police the system for potentially infringing works, rather than simply responding to individual requests. Given the resources available to YouTube and the $1.6bn Google paid for it, that seems pretty reasonable at first. Yet what happens when such a rule is applied to every repository on the internet?

Google's defenders would counter that the safe harbour was itself the result of a legislative compromise with content companies, giving them new rights, but preserving immunities so that the next disruptive technology would not be strangled at birth by established industries. As the University of Michigan's Jessica Litman notes, lots of technologies have developed this way - from the recording industry itself to radio, jukeboxes and the VCR. Each profited from existing content, transformed the marketplace and did so in a legal limbo, where it was not clear who was the trespasser and who was the guardian of the public domain. Here, vagueness in property lines might have been a positive thing, forcing both sides to compromise.

When used in policy debate, the words "Microsoft" and "Google" operate to make people stupid. Half the population seems to assume Google's position will exemplify the public interest, while Microsoft is an evil empire bent on total control of our minds. (The satirical paper, The Onion, explores this hilariously in an article where a Google-planned genocide is said merely to raise "some potential privacy concerns".) This benign image may explain the muted criticism of Google's intellectual property missteps - the restrictive deals Google has struck with university libraries, for example, which prevent large-scale access by search engines or digital library projects even where public domain works are involved.

In many cases, Google's self-interest has aligned with the public interest. "That would make Google illegal," is the most effective argument against expansive property claims. What about YouTube? On a commonsense level, Viacom's arguments will persuade many. It is hard to portray Google as a helpless
start-up. But if we end up narrowing defences to reach YouTube's deep pockets, we might make the next Google less likely to appear. Safe harbours will acquire rocks and shoals. Conclusion? In intellectual property, the cry "Stop! Thief!" is more complex than it seems. Ask Microsoft's lawyers.

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