國立雲林科技大學
95學年度碩士班入學招生考試試題

系所：科法所
科目：法學概論

一、申論題

1. 何謂「類推適用」?而我國民法及刑法之適用是否均容許「類推適用」?試析述之。*(本題佔25%之總分)*

2. 何謂法律不溯既往原則？其目的為何？是否為立法上之限制？試析述之。*(本題佔25%之總分)*

二、法律文獻評析 *(本題佔50%之總分)*

A Rotten Ruling

By Lawrence Lessig

They say we academics live in an ivory tower. As I look around at my colleagues, I wouldn't quibble much with that charge. But unfortunately, we're not the only ones. There is a depressingly ivory tower character to much of what the US Supreme Court does, especially in areas affecting copyright. Innovation will continue to suffer unless someone on the Court finds a way to wake up the other justices.

You're living in an ivory tower when you stop caring about consequences. What's important to you is theory or some weird sense of abstract justice. Irrelevant is how your theory, or justice, connects to the real world. On this standard, the members of the Court deserve tenure at Oxford.

The *Grokster* ruling in June was just the latest example. The Court decided that "one who distributes a device with the object of promoting its use to infringe copyright ... is liable for the resulting acts of infringement by third parties." Pundits*(自命權威者)* bathed the Court in praise for its "sensible balance" between the demands of Hollywood and the pleas of technologists. The pundits are idiots. The *Grokster* case revealed the worst in Supreme Court ivory towerism. Astonishingly, hardly anyone noticed.

The real issue in the lawsuit, for those who care about innovation, was not whether *Grokster* was run by a bunch of angels, nor even whether the company should be allowed to continue its business. The real question was, Who gets to decide whether the file-sharing technology it promoted should make *Grokster* liable for copyright infringement - Congress or the courts? If the answer is Congress, then innovators at least know their enemy. Wars about liability get voted on; any resulting liability is usually prospective. But if the answer is the courts, then innovators are forever at the mercy of enterprising lawyers. It takes nothing to ensnarl a startup in death-inducing legal bills, at least when the legal standard is uncertain.

So did the Court give innovators certainty? Consider how the *Grokster* rule applies to what everyone thinks should be the easiest case: the Apple iPod. Is Apple clearly free from Grokster liability? Amazingly, the answer is no.

Apple has sold about 15 million iPods, each capable of holding between 1,000 and 15,000 songs. Its iTunes music store has sold about 500 million songs for 99 cents each. That works out to only 30 songs or so per device. Does this surprise Apple? Did it really expect that people would buy a 60-gig iPod for $400 and then put $14,850 of music in it? No. Apple expected precisely what it advertised - that people would "Rip. Mix. Burn." music from CDs to iTunes and, in turn, to their iPods. After all, as the ads say, "It's your music."

Well, is it? That's still unclear. Congress passed a law to give consumers the right to copy music to analog devices - cassette tapes. But courts have held that that law does not extend to digital devices - iPods. And if it took a law (rather than the principle of fair use) to give you the right to make a mix tape, then, as many have argued, it takes a law to authorize transferring songs to an iPod.

Before the *Grokster* decision, this was not Apple's problem. It had built a machine "capable of" substantial noninfringing uses, like a VCR or cassette tape deck. How people used the iPod was irrelevant to Apple.

Now a court is supposed to decide whether a company like Apple "promot[ed]" or "fostered" copyright infringement through design, behavior, or words. And while no court would ever actually hold Apple liable, the point that ivory tower

sorts miss is that there is nothing in the judges' ruling to stop litigation against Apple before Apple has spent millions on lawyers.

Apple, of course, can afford millions on lawyers. But can a startup? Would a small, young company ever build a business close to the insanely uncertain line of regulation that copyright law has become?

When the Supreme Court handed me a defeat three years ago in a challenge to Congress's practice of perpetually extending copyright terms (*Eldred v. Ashcroft*), it said it defers to Congress in judgments about intellectual property. With *Grokster*, the Court has now qualified that deference: We defer, except when we don't like the defendants. Then we make up a common law rule to punish the bad guys.

But the only people punished by this ivory tower activism are entrepreneurs and their would-be customers. With all due respect, justices, either defer or get real. And leave the clever theories of "evolving standards of liability" to harmless academics.

<u>問題:</u>美國聯邦最高法院於 2005 年 6 月就「MGM 對 Grokster」(*Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764, U.S., 2005.)乙案，判決 Grokster、Morpheus 等提供 P2P（peer to peer，P2P)檔案分享服務的業者，在用戶非法交換有著作權的歌曲、電影和電視節目時，也需承擔侵權的法律責任。以上短文係美國史丹福大學(Stanford University)法學院教授 Lawrence Lessig 就本判決所為之評論 (Wired Magazine, September 1, 2005)。<u>請就本文所涉及之議題與其論點提出您個人之評析與看法</u>(*請以中文分點論述，能就正反兩面論點分析，並佐以法律、科技或其他觀點、立法例及實際案例等，說明論點者尤佳*)。

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第一題：(34 分)

某年八月初，房東阿雄有洋房一間，內有二房一衛一廁，大明看過之後頗爲滿意，乃要求承租一年，但租金四萬元對仍屬學生身份的大明而言顯然偏高，於是與房東阿雄約定若大明能在 8 月 15 日之前找到一位室友即願以 15,000 元價承租，隨即交付定金 30,000 元給房東當做是押租金，但在約定期限之 8 月 15 日屆至後，大明並未找到適當的室友，此時，阿雄在未告知大明情況下將該洋房出售予阿東，阿東即搬入其中一個房間居住。大明於九月中旬開學時並不知此事，以爲房東已爲其找另一位房客，得享較低房價，於是欣然搬入，並按月透過銀行帳戶轉帳方式支付租金予阿雄，但在住進此洋房半年後發覺該洋房金玉其外，敗絮其中，屋頂與牆壁常有漏水現象，木頭主樑柱常於半夜發出「咿唔，咿唔」的怪聲，使其無法專心讀書，成績低落，更可怕的是另一室友阿東是來自斷背山的怪客，大明甚爲苦惱而欲找阿雄退租，可是阿雄說他早已不是房東而不干其事，阿東則認爲租約未到期而不願答應，請問大明應向何人請求終止租賃契約與損害賠償；另外，對於使他心生惶恐的部分，可否請求賠償人格權損害與純粹的時間浪費損失，並要求返還加倍定金呢？

第二題：(33 分)

甲中古車經銷商出售汽車予乙，車價八十萬元，乙轉贈予丙。甲、乙約定，丙對甲有直接請求交付該車之權。甲於民國九十五年二月交付該車予丙，丙以之作爲營業用計程車。一年後，丙以該車載送乘客丁時，因甲於交車前未檢測出並排除之機件瑕疵，致發生車禍，路人丁因而受重傷，該車亦嚴重毀損，據估修理費高達五十萬元。請問：丙、丁得否請求甲、乙賠償損害？

第三題：(33 分)

A君爲X校研究所之在職研究生（任職於C公司），參與B教授之國科會研究計畫。今A君在未知會X校及B教授的情形下，私將C公司未公開的技術概念運用於研究計畫中，以期儘速產出成果以利畢業，結果順利完成計畫並發表論文。C公司知悉後，向X校及B教授提出損害賠償。X校、A君及B教授分別該負什麼責任呢？倘若B教授是在知情且未知會校方的情形下，三者又該負如何的責任？試從民事觀點加以剖析之。