國立雲林科技大學
96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、 近來我國陸續發生總統國務機要費案及台北市市長特支費案，均可發現檢察官扮演相當重要角色，檢察制度影響國家之政府運作甚鉅；故請就檢察官在檢察機關之配置、性質與職權，申論其主要內涵。30%

二、 請就「權利」理論中的「人民之公權」與「人民之私權」兩種分類，各別申論其主要內涵。30%

三、 法律文獻評析（*本題佔 40%之總分*）

The case against YouTube

Technology has to have room to grow, but not at all costs.

By Douglas Lichtman

DOUG LICHTMAN is a professor of law at the University of Chicago. He joins the law faculty at UCLA this fall.

LAST WEEK, I joined a team of attorneys suing Google over the YouTube video-sharing website it owns. The decision to join the fight was a tough one for me because, like many people, I am excited by the promise of user-generated video. I like the idea of a website that helps aspiring producers and amateur filmmakers distribute their work to the public. That said, YouTube has been, throughout its existence, a haven for copyright infringement.

The problem is that users upload excerpts of copyrighted movies and television programs without authorization, and then YouTube happily distributes that contraband to the public. And Google, knowing all this and benefiting from the attention the unauthorized videos bring, has refused to take even simple steps that would reduce the infringement without meaningfully interfering with the service's legitimate use. That is what led me to join Viacom Inc.'s legal team.

The legal nuances of the suit will soon enter popular discussions. Lawyers on both sides will cite the Digital Millennium Copyright Act and argue about the extent to which its provisions provide a "safe harbor" for YouTube's service. They will parse copyright case law and debate such legal doctrines as "contributory infringement" and the defense of "fair use." Before the forest becomes lost in those trees, however, it's important to make three basic points.

First, copyright law plays a crucial role in protecting the rights of artists and others who develop

and distribute creative work — but it must do so while making room for technological innovation. Modern video and audio technologies make it possible for every basement to become a recording studio and every street corner a movie backdrop. These creative works need an audience. Sites such as YouTube and Microsoft's Soapbox are obvious and natural means to that end, and copyright law must find a way to let them flourish.

Yes, some people will slip unlicensed content into the mix, uploading a clip from "Mean Girls" or offering as their own pirated footage of Homer Simpson or Jon Stewart. But the law cannot condemn an entire technology merely because on occasion it will be abused. Copyright law must draw a balance. It must improve technologies without banning them; it must set penalties to discourage willful infringement without destroying incentives to pursue even borderline technologies. Copyright courts, in short, must wield scalpels, not axes.

With that as a given, however, courts must also take into account the second point: Providers of a new technology will often be tempted to attract a customer base by allowing copyright infringement. What better way to draw users to your new video website than to offer, at no charge, clips that users already want to see? To counteract this, the law must demand reasonable precautions both at the design and operational stages of a technology.

Exercising care is not a Herculean task: YouTube, for instance, has enormous information about what search terms its users enter and what tags posters submit when they turn in a new video. That information could be combined with public data about characters, names and movie titles to easily identify videos that might need to be reviewed by a copyright lawyer or run through an automated system that compares suspicious clips to known copyrighted work. Perfection is not required. Cost-effective filtering technologies are.

Finally, bad intent on the part of providers must be mercilessly punished. By necessity, copyright rules in new-technology settings are flexible and imprecise. They allow creators of new technologies to experiment with design and implementation. They excuse small, innocent mistakes. But that flexibility cannot be entrusted to people or companies that knowingly exploit loopholes. This is why the last big copyright fight — the music industry's case against Grokster — proved so simple. The question of exactly which precautions the law should demand of Grokster and related services was a difficult one. The question of whether Grokster's ill-motivated founders should be allowed to play any role in establishing those rules, by contrast, turned out to be embarrassingly straightforward.

Admittedly, even guided by these three touchstones, copyright law will struggle mightily when it comes to defining the permissible legal contours of the YouTube service. Recently, for instance, YouTube introduced a feature that allows users to limit the audience for their videos to pre-approved friends. That might be an appealing feature to the extent that it allows Grandma to share her vacation videos with the family without showing them to the whole world. But it poses a challenge for copyright holders who obviously cannot monitor videos they cannot even see.

This reinforces the importance of the three touchstones. Copyright holders cannot be armed with too powerful a legal remedy because even a well-meaning technologist might on occasion innocently misstep. At the same time, those who own and operate a new technology must feel constant pressure to account for the copyright implications of their decisions.

And, above all, copyright law can welcome only those with pure motives. Those who abuse the law's caution have no claim for its mercy.

[Los Angeles Times, March 20, 2007
http://www.latimes.com/news/printedition/asection/la-oe-lichtman20mar20,1,3708310.story]

問題：今年3月12日(美東時間)，美國Viacom媒體公司以影音串流分享網站YouTube侵權為由，控告YouTube的母公司搜尋引擎龍頭Google，並求償十億美元。以上短文係美國芝加哥大學法學院教授Douglas Lichtman，以原告Viacom公司律師之立場，就本訴訟所為之評論 (Los Angeles Times, March 20, 2007)。請就本文所涉及之議題與Litchtman之論點提出您個人之評析與看法。
(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，並據以提出之個人觀點或結論者尤佳。)

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科目：民法

96學年度碩士班－科技法律所民法考題

壹、「絨毛膜採樣」原本是用來診斷胎兒染色體或基因異常的一種方法，該方法在超音波導引之下，經由子宮頸或腹部，將一根導管或細長針，穿入胎盤組織內，吸取少量的絨毛，作染色體、基因或酵素的分析。某私立甲醫院的乙婦產科醫生告知年齡近四十歲的丙孕婦已經懷有身孕後，因而欣喜若狂。丙孕婦在懷孕第9週時，便急欲早點知道丁胎兒之性別，她從乙醫生口中得知，有所謂的「絨毛膜採樣」之手術可以被用來確認胎兒之性別，此外，乙醫生也客觀真實地告知丙孕婦，「絨毛膜採樣」之手術過程當中有極高機率的危險性。在丙孕婦多次懇求表示願意支付高額價金之下，最後乙醫生同意進行該絨毛膜採樣手術，使丙孕婦早點知道丁胎兒之性別，且乙醫生自信自己行醫多年的經驗，其能力應該可以勝任之。丙孕婦與甲醫院簽下「同意手術，醫院不負任何事故之責任 」之切結書後，乙醫生以爲有此切結書，便可以安心地進行絨毛膜採樣之手術。不料，手術之後，乙醫生多次進行對丙孕婦的定期產前健康檢查，其實早已發現絨毛膜採樣之手術過程已經負面地影響到丁胎兒。但是，乙醫生隱瞞實情，一直未告知丙孕婦，錯過法律允許丙孕婦可以決定是否實施人工流產之時機。果然，丁胎兒出生之後，手腳嚴重畸形，丙孕婦傷痛欲絕，憤而聘請律師，控告甲醫院以及乙醫生，必須還她公道。甲醫院以及乙醫生均主張，丙孕婦不僅明知絨毛膜採樣手術之危險性並得其同意，才進行的，故他們無法律責任可言，僅願道義上給予慰問金，不願賠償。

試問甲醫院、乙醫生、丙孕婦以及丁胎兒彼此之間在民法中的法律關係如何？(50%)

貳、民法第1條：「民事，法律所未規定者，依習慣；無習慣者，依法理。」，試回答以下之問題：

一、試臆測立法者制定該條文之目的何在？(20%)

二、何謂民事「法律」？(10%)

三、何謂民事「習慣」？(10%)

四、何謂民事「法理」？(10%)

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本試卷共三題，第一題爲33分，第二題爲34分，第三題爲33分，共計100分，請依題號作答，並將答案寫在答案卷上，違者不予計分。

1. 在我國法律競合的判斷上，應先判斷是否爲特別關係，其次判斷是否爲補充關係，最後才判斷是否爲吸收關係，我國實務上42台上410號認爲收受僞造紙幣、器械或原料(刑法第199條)爲低度行爲，應爲僞造紙幣之高度行爲(刑法第195條)所吸收，實務見解是否有疑問，試析論之。
2. 甲、乙兩人共同意圖不法所有而在公園向情侶A與B收取戀愛稅，甲持袖珍本六法全書，以毛巾裹覆後，佯做黑星手槍抵住A之背部，乙威脅稱「交付皮夾內所有錢財，否則有你好看的」。A爲跆拳國手，深知甲在虛張聲勢，但因顧及B之安危而未加抵抗，B則因驚嚇過度而自願交付皮夾。甲、乙取得皮夾後因行色匆忙而旋即在公園門口爲巡邏員警查獲，試問甲、乙兩人所犯何等罪名？
3. 甲因爲把上班必須使用的書類文件遺忘在距辦公室1公里的自家中，於是在未徵得同事乙的同意下，擅自騎用乙放置於校園車棚內之自行車返家取物，往返共計花費了20分鐘，其間乙並不知其自行車已遭甲騎用，試問甲所犯何等罪名？