

1996 IP EXAM [UNOFFICIAL DRAFT COPY]
Professor Margaret Jane Radin

[title info, time, place, etc.]

INSTRUCTIONS

1. This examination consists of two Parts. You must answer both of them.
2. Part I will account for 60% of your grade. Part II will account for 40% of your grade. Please budget your time accordingly. I suggest one-half hour to read the questions and think about them; 90 minutes for Part I; 60 minutes for Part II. [NOTE: Subparts will not be equally weighted in grading but rather will be weighted according to how much time I think they should take.]
3. This is an open book examination, with limits. You may use your casebook, statutory supplement, and any materials you have personally prepared for yourself. (This is intended to exclude commercial outlines and notes as well as outlines and notes prepared by other students.)
4. If you are writing in blue books, please write on only one side of the page. I would appreciate your double-spacing, especially if your handwriting is difficult to read.
5. If you need more facts in order to answer a question, please state what they are and why you need them.
6. YOU'VE BEEN A TERRIFIC CLASS!! Best wishes for a great summer.

PART I

Arthur collects recipes. He used to keep his recipes on various slips of paper which he later copied by hand onto note cards and filed alphabetically by title in a large card file. Two years ago, however, he transferred his whole collection to a computer database, entering all the information on his note cards into the program by typing each one. He now adds new recipes he collects directly to his database. The program files recipes alphabetically by title, just as the old card file did, but, in addition, the database can be searched by cuisine of origin (e.g., Chinese recipes, Turkish recipes, etc.), by various ingredients (e.g., recipes containing paprika), by course (e.g., recipes for desserts), by date of entry, and in many other ways.

Arthur's recipes come from many sources. He copies recipes he finds in novels and in historical documents. He transcribes recipes told to him by senior citizens in small towns. He copies recipes printed on product packages. He copies interesting recipes from many different kinds of

cookbooks, some of them in foreign languages (in which case he translates the recipe into English). He downloads interesting recipes from computer bulletin boards and Internet newsgroups where they have been uploaded by other recipe collectors.

Arthur modernizes and clarifies recipes where necessary. "Add a glass of sugar and mix" becomes "Add 1-1/2 cups of sugar and beat until well blended." He changes metric measures into their American equivalents. He also adds titles for recipes that are untitled, and he often changes the title of a recipe to make it more descriptive (e.g., "Mother Radin's Apple Pie" becomes "Traditional American Green Apple Pie").

Occasionally Arthur makes up a recipe, usually by purchasing a food item and then experimenting until he discovers how to make it. In this way he arrived at the recipe for a particular kind of peanut butter cookies manufactured by Rookie's Cookies, Inc., and added it to his database. The company had never made its recipe available to the public. Indeed, printed on each package was the notice: "Our recipe is a secret. Exclusive manufacturing rights are owned by Rookie's Cookies, Inc."

Rookie's Cookies, Inc. has prospered using its secret recipe. The company was established by B.J. ("Rookie") Bingo in 1990. It distributes its product in retail stores throughout the western United States. The secret recipe uses ingredients and techniques developed by another "Rookie," R.C. ("Rookie") Cass in the late 1980's (described below). In fact "Rookie" Cass founded The Rookie Co. in 1991, which manufactures chocolate chip cookies, and distributes them in retail stores throughout the western United States. Cass has applied to register his company name as a trademark; the application is pending. ("Rookie" Bingo and "Rookie" Cass are not related. Apparently they each picked up the nickname long ago as Little Leaguers.)

Cass, a lover of fine art, commissioned Donna in 1992 to create a large sculpture to adorn the courtyard of The Rookie Co.'s plant. Donna was well known as a creator of corporate art. She proudly delivered her abstract sculpture, "Tilted Cookie," in 1993, and Cass paid her for it in full. Unfortunately, however, Cass soon decided he couldn't stand to look at it. Accordingly, he had it cut into three pieces and stored it in the basement.

The ingredients and techniques developed by Cass involve a chocolate chip cookie recipe in which the particular combination of ingredients, together with the process of baking them, produces cookies that are consistently more nearly round in shape than cookies previously on the market, and thus more suitable for packaging in tubes. A patent relating to this recipe was issued to Cass on January 20, 1989, after a period of negotiation with a rather inexperienced examiner in the U.S. Patent and Trademark Office (PTO). The patent contained two claims, as follows:

"(1) In a process for manufacturing objects suitable for consumption as food by human beings, a method for producing a stable circular shape for said objects

"(2) In a composition of matter forming a material capable of being divided into a set of nearly identical objects suitable for consumption as food by human beings, the combination of components

comprising said composition of matter whereby a stable circular shape of said object results when said objects are subjected to dry heat for an appropriate length of time"

The recipe (formula) for Cass's chocolate chip cookies, now manufactured by The Rookie Co., was detailed in the specifications of the Cass patent. An anonymous user obtained the Cass patent from the PTO and posted the recipe to a food lovers' computer bulletin board. From there it was downloaded by Arthur and added to his database.

As a service to other culinary enthusiasts, Arthur made his database available on a server (computer) which can be accessed on the World Wide Web by anyone with Internet access and appropriate browser software running on his or her personal computer, no matter where that computer is physically located. Anyone who accesses his collection sees Arthur's initial message: "© 1995, 1996 Copyright by Arthur; all rights reserved."

After browsing through Arthur's collection, George decided to publish a book entitled "CYBERSPACE COOKIES." Accordingly, he selected 200 recipes from Arthur's database and downloaded copies of them to his personal computer. He did not alter the text of the recipes, but he changed the titles so that they would be fanciful instead of functional (for example, "Alt.Religion.Scientology Cookies" instead of "Dark Chocolate Cookies"). Among others, both the Rookie's Cookies, Inc., recipe for peanut butter cookies and The Rookie Co.'s recipe for chocolate chip cookies appear in George's book. George's book was published about one year ago. He has so far sold 500,000 copies at \$15.95 per copy.

Impressed with the early success of George's book, Helen has now opened a retail shop called "Cyberspace Cookies," in which she uses the recipes in George's book to bake and offer for sale all 200 varieties of cookies in the book. Helen has gross revenues of \$30,000 per month and is considering franchising her operation nationally.

In addition, Helen has started a cooking show on a local independent TV station. She directs the camera crew to display the appropriate pages of George's book on the screen as she prepares the recipes, two per week. All of Helen's shows are videotaped by the station simultaneously with broadcast, with the hope of later sale. Unbeknownst to Helen and the station, though, Juanita has been taping all of the shows on her VCR at home. She has made 35 copies of each videotape and given a set of them to all of the people on her business gift list.

1. Arthur wants to sue George and Helen for taking recipes from his collection. Please explain his legal position.

2. Bingo is upset that Arthur duplicated Rookie's Cookies, Inc.,'s secret recipe. He wants to enjoin Arthur from including it in his database. He wants to collect damages from George for including it in his book, and from Helen for displaying it on her TV show. What do you think of Bingo's legal position on these issues?

3. Cass wants to force Arthur to remove The Rookie Co.'s recipe from his database. He wants to force Rookie's Cookies, Inc. to change its name. He

also wants to force Rookie's Cookies, Inc., to stop using the recipe for peanut butter cookies based upon the techniques and ingredients he developed, and to pay damages for use of this technology up to now. Moreover, Cass wants to enjoin further sales of George's book because it contains his recipe, or at least collect damages from George; and he wants to stop Helen from baking and selling cookies according to his recipe, or at least collect damages from her. What do you think of his legal position on these issues?

4. Donna is VERY upset about what Cass has done to her sculpture. She wants to force him to put the sculpture back in the courtyard, or for some other relief. What do you think of her legal position?

5. George wants to know whether he is liable to Arthur, Bingo, or Cass. (You have probably answered these questions above.) George also would like to stop Helen from baking and selling cookies according to the recipes in his book, or at least collect damages from her; and he would also like to stop Helen from displaying these recipes on TV, unless Helen pays for them. What do you think of George's legal position on these issues?

6. Helen wants to know whether she is liable to Arthur, Cass, or George. (You have probably answered these questions above.) Helen also would like to stop Juanita from making videotape copies of her show and distributing them to her business acquaintances, unless Juanita pays Helen. What do you think of Helen's legal position on these issues?

PART II

Intellectual property regimes serve to divide information into two broad categories, private property and the public domain. Information that comes within the scope of one of the recognized forms of intellectual property becomes private property. At the same time, there is a public domain of culture, politics, and free speech, an information commons that all are free to use. Here is a three-part question about the scope of the two categories of information, private property and public domain. You can answer the parts separately or roll them all into one, whichever strikes you as more suitable for the exposition you have in mind, but be sure to cover all three parts.

(1) Some people consider the various forms of intellectual property to be islands of monopoly in a sea of free competition. To put it another way, intellectual property regimes delineate specific domains of privatized information in a background context of a broad public domain of free expression and interchange of ideas. Various legal provisions, doctrines, and interpretations support the public domain by limiting the scope of intellectual property (for example, the idea/expression dichotomy in copyright law; or the role of generic terms in trademark law). Identify as many as you can of these limiting provisions, doctrines, and interpretations.

(2) On the other hand, some people consider the public domain to be insufficiently--or incoherently--protected by these statutes, doctrines, and interpretations. They consider the public domain to consist of fragmented and

beleaguered islands of free expression in a sea of monopoly control over information by private owners. What, if any, evidence or arguments support this position?

(3) Advocates for a broader public domain make proposals such as the following. Please pick two of these proposals and evaluate them. Discuss their normative attractiveness (or unattractiveness) as well as the practical and political feasibility of implementing them given our present situation. Use examples.

--The term of copyright should be shortened to 20 years, analogous with patent.

--Use of copyrighted materials for news reporting, parody, or political debate should be presumptively fair use.

--Noncommercial use of trademarks for political debate or cultural criticism should be privileged.

--The right to control preparation of derivative works should not be a part of copyright's "bundle of sticks."

--Patents should be voidable at the instance of any party who can prove that an adequate return would have been provided merely by being first to market, with the state paying the legal fees for successful suits.

--Computer software should be neither patentable nor copyrightable, but should be protected by a sui generis regime in which "clones" can be kept off the market for a period of two years.