

Patents and the First Amendment

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Intellectual Ventures v. Symantec

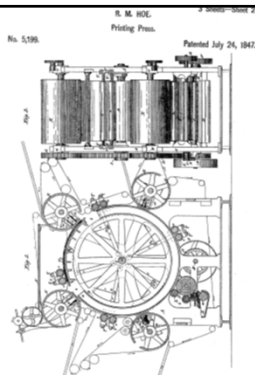


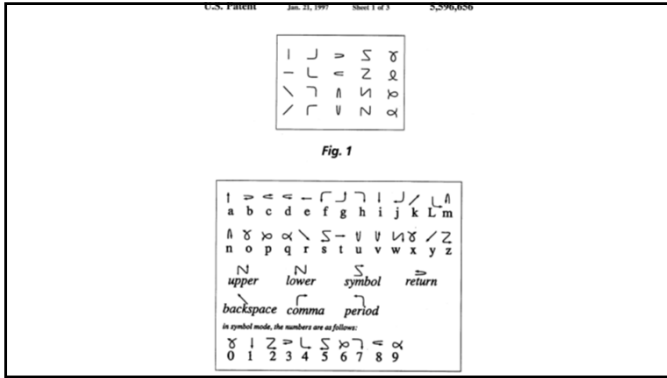
Judge Mayer

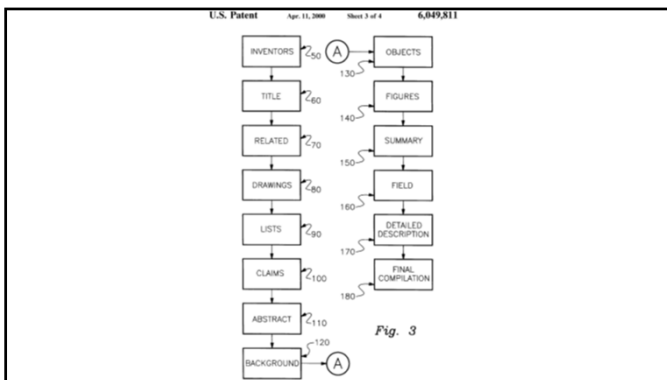
"Patents, which function as government-sanctioned monopolies, invade core First Amendment [free speech] rights when they are allowed to obstruct the essential channels of scientific, economic, and political discourse"

"Suppression of free speech is no less pernicious because it occurs in the digital, rather than the physical, realm. . . ."

"Essential First Amendment freedoms are abridged when the Patent and Trademark Office ("PTO") is permitted to balkanize the Internet, granting patent owners the right to exact heavy taxes on widely-used conduits for online expression. . . ."







Expressive Patent Continuum

- Technological Conduits
 - High patent interest
 - Lowest expressive content
- Software
 - Text that behaves
 - Intermediate expressive content
 - Export control cases
- Pure Speech

State Action Requirement

- Enforcement Mechanisms
 - New York Times v. Sullivan
 - Gertz v. Robert Welch
 - Cox Broadcasting v. Cohn
- Shelley v. Kramer
- Patent Office Imprimatur

Copyright Parallels

- Traditional Contours
 - Fair use
 - Idea/Expression dichotomy
 - Adopted close in time
- Patent Divergence
 - Lack of exemptions
 - Minor exemptions
 - Technological convergence

Level of Scrutiny

- Patent System or Individual Patents
 - Facial or applied
- Heightened Scrutiny
 - Content discrimination
 - Novelty, utility, non-obviousness
 - General application
 - Expressive distinction
- Strict scrutiny
- Intermediate scrutiny

Constitutional Scrutiny

- Compelling Governmental Interest
 - Constitutional mandate
- Narrow Tailoring
 - Patent statute
 - Individual patents
 - Bad patents
- Least Restrictive Means
 - Innovation alternatives
- Overbreadth/Vagueness

Thank You

Questions Welcome
