

This American Life
Episode 441
"When Patents Attack!"
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Ira Glass: Back during the rise of the dot-coms and the Internet, Jeff Kelling and a few friends were working as programmers together at this company in Dallas, and they decided they want to get together the way that tech geeks were doing all over the world at the time and come up with an idea for their own Internet company to start.

Kelling: One of my business partners, Andy, his wife had just had a baby, and we started thinking about photo-sharing. You know, Andy could share his photos of his new baby with, you know, the grandparents that live across the state.

Now this is 1999. This is before Flickr, this is before Shutterfly. But Jeff and his friends weren't the first people to try to make a business out of photo sharing. There were other companies out there trying to make a go of that. And it is not easy. It took Jeff and his partners years, working nights, working weekends until finally in 2006, their start-up was doing well enough that they all could quit their day jobs and do that full-time. Their company was called FotoTime, it's FotoTime with a "F." Jeff says that they were living the dream, entrepreneurship, their own business. Until:

Kelling: We got a letter in May of 2008 and it wasn't a friendly letter. I mean, if you take a letter from the I.R.S. that says "we're going to audit you," this letter was even less friendly than that. It pretty much said, "you're in violation of three of the patents that our company holds. You must contact us immediately to arrange payment and settlement or we will be taking you to court."

[music]

Kelling: And we were wondering, you know, what is all this? I mean, this whole thing was developed internally, it's not like we went through the Patent Office and stole people's ideas. And it's also not like we were the first to do this. And we looked up this lawsuit online and we saw there were over 130 companies named in this lawsuit.

All the big names were there. Yahoo, which owns Flickr, as well as Shutterfly and Photobucket, and lots of small companies like Jeff's as well.

The company suing Jeff was a company called FotoMedia. Jeff was FotoTime with an "F." This was FotoMedia with an "F." And one thing that was odd: they weren't actually a competitor of Jeff's. They didn't have a website where you could upload or share photos. And it wasn't clear to Jeff what in the world he had stolen from them.

Had he accidentally come up with, you know, a way to upload files or maybe see photos online or do the credit card transactions that already somebody had some sort of patent on? Or was it that he hadn't stolen anything and they were just looking for a payout, scamming him for some money?

And what was especially galling to Jeff? When he called them to ask, "What am I stealing from you guys?" they wouldn't tell him.

Kelling: That was a question they wouldn't answer. They said they wouldn't answer that until we got into court. So they wouldn't even identify what parts of our business or what they thought we were doing to use... to use their technology.

But to go to court, to answer that question, was gonna cost money. A lot of money.

Kelling: It was between two and five million dollars and that's more than our company could handle, honestly. We knew we had to settle this thing somehow. There would be no more FotoTime today if we had to do that.

Amazingly, it wasn't just Jeff and the other companies getting sued over these three patents who were upset. Out there in the world was an inventor who came up with the original ideas that got patented for two of these three patents, and he wasn't that happy about the lawsuit either. The guy's name was David Rose and he was issued these patents back when he started his own photo-sharing company, back in the mid-'90s, just a couple years before Jeff Kelling started his.

And he'd gotten the patents in part because having a patent was just one of those things you did to raise money from investors, a check box you checked to prove you were serious, and to protect yourself from some company swooping in and stealing your ideas.

He sold his company in 2000, and the patents he got along with it. He thought the people who bought his company would expand the company, make it prosper. Hopefully turn it into a household name.

He has some problems with what they chose to do instead. He talked to *This American Life* producer Alex Blumberg and reporter Laura Sydell.

Rose: It's the hoarding and non-operating of the technology that doesn't feel good, because they didn't become the brand that they could have become. They had the protection. They could have built Flickr.

Alex: Right, and instead they waited for somebody else to build Flickr and then they sued Flickr.

Rose: Yes.

Companies that make no products, but go around suing other companies that do make

products, over supposed patent infringement are so common in Silicon Valley these days that there's a derogatory term for it. Trolls. Or patent trolls. David Rose explains trolls...

David Rose: You don't know that there's one under the bridge. They pop up. They have unreasonable demands. They can charge monopoly tolls or monopoly rents.

So the guy who came up with two of these patents doesn't want the lawsuit. And the guy getting sued for the patent doesn't want the lawsuit. And yet, the lawsuit happens.

FotoMedia, by the way, denies being a patent troll. Its C.E.O. told us that "patent troll" is a term that people throw around very loosely when they're in litigation over patent rights.

As far as we can tell, and not a lot of this information is public, most of the companies being sued ended up doing what Jeff did and agreed to pay FotoMedia money. Some of them were put out of business.

Jeff felt like he had no choice but to settle. He told Laura and Alex that reaching a settlement ended up taking six months. A very rough six months.

Kelling: It feels like if they're not reasonable, OK, our venture of 10 years is going to be gone. They have to be reasonable or we will just plain be gone. And we're talking about 10 years of our life. You know, honestly, as I'm talking about it now, it's kind of raising my heartbeat a little bit because I just remember how I personally felt. Just the huge amount of anxiety and lack of control over the whole situation. It was just an awful feeling.

[music]

Laura: Can I ask what that final settlement was? How much it was?

Kelling: No, no. Unfortunately, part of the terms of our settlement agreement is that we don't discuss the amount.

Alex: Did it put your business in danger?

Kelling: It did. And they knew that. The settlement they wanted to get was just enough to put us in danger but not to close us. And I'll stop there.

[music]

Patents are so foundational to the American way of life that they're in the Constitution. Their purpose is, quote, "to promote the useful arts and sciences."

In other words, to get people to share their ideas and inventions to say to somebody like Eli Whitney, OK, you have this amazing invention, the cotton gin. If you tell everybody how it works and how to make their own, in exchange anytime someone uses the idea, you get paid.

If there were no such thing as a patent, Eli Whitney would have to keep his invention hidden in a dark room with no windows, so nobody would steal the idea, and then people would bring him their cotton and he'd spit it out for them, all processed, on the other side. Instead of that we had thousands of cotton gins, everywhere. Patents make it safe to share and to innovate.

But today, lots of investors and innovators in Silicon Valley, maybe the majority, would tell you the patent system is doing the exact opposite of what it's supposed to. It's not promoting innovation. It's stifling it. Because patent lawsuits are on the rise. Patent trolls are on the move. Patent lawsuits are so common now that it's hard to find even one semi-successful startup in Silicon Valley that has not been hit with a suit, which slows innovation, makes it harder for companies to prosper, hurts our global competitiveness (is this getting big enough for you?), costs us all more money when we buy the stuff these companies sell.

From WBEZ Chicago, it's *This American Life*, distributed by Public Radio International, I'm Ira Glass. Today on our show: "When Patents Attack!"

Our guides this hour are going to be NPR correspondent Laura Sydell and *This American Life* producer and *Planet Money* co-host Alex Blumberg. OK, take it away guys.

Laura: The term patent troll was first coined by a guy named Peter Detkin, who at the time was one of the top lawyers at one of the biggest tech companies in the world, the computer chip maker Intel.

Alex: Around 1999, Intel found itself in the position that Jeff Kelling, the guy we heard from at the top of the show, was in — getting approached by a company that didn't build anything:

Detkin: Simply saying "I have a patent that covers semiconductors generally. You make a semiconductor. And therefore, you should pay me some money." And there were a lot of claims like that.

Laura: One lawsuit in particular made Peter Detkin so mad that he called the lawyer who filed it a "patent extortionist." The lawyer turned around and sued Peter Detkin for libel. So, Detkin needed a better name.

Detkin: So I had a contest inside Intel. The contest itself was named "The Terrorist." And the suggestions, we got a lot of suggestions but none really fit. But, at the time my daughter was four or five and she liked playing with those troll dolls. The original one, in fact, is still in my office. And so I turned to her and said, "Oh, the story of a troll kind of fits 'cause the whole Billy Goats Gruff thing, it's someone lying under a bridge they didn't build, demanding payment from anyone who passed. I said, "How about a patent troll?"

Alex: The name stuck. And if anything, the problem of patent trolls just got worse. From 2004 to 2009, the number of patent infringement lawsuits jumped by 70 percent. Licensing fee requests, like what happened to Peter Detkin and to FotoTime, went 650

percent. Today, pretty much any time you talk to a computer or tech person in Silicon Valley, and the subject of patents comes up, everyone groans.

Laura: I hear these groans a lot. I live out here in San Francisco. And just to get a flavor of this, the other day I went down to a park called South Park, around noon. It's a place where a lot of tech workers eat their lunch. And the sentiment was universal:

Laura: If I say patent system, what do you say?

Vox 1: I think it's just a way for lawyers to make money and basically it's a killer for creativity.

Vox 2: Complicated. Broken.

Vox 3: It's basically a flim-flam game that anybody who knows how to take advantage of it, is doing.

Laura: Do you kind of groan when you hear the word?

Vox 4: I do, yeah. You wanna hear a groan for the radio?

Laura: Yeah, let's hear a groan.

Vox 4: Grrr.

[music]

Laura: If I say the word patent troll, does any company or any entity come to mind in particular?

Vox 4: Nathan Myhrvold, I guess, and, like, whatever his company is. It has some stupid name like Associate Associates or something like that. I don't know.

Laura: The name he's searching for is Intellectual Ventures. The company Nathan Myhrvold founded in 2000. Nathan Myhrvold used to be the chief technology officer at Microsoft, where he made a lot of money, hundreds of millions of dollars. Even if you haven't heard of Intellectual Ventures, you might have heard of Nathan Myhrvold

Steven Colbert: My guest tonight has written a six-volume book on cutting edge food made with modern science. Please welcome Nathan Myhrvold!

[applause]

Alex: This is Myhrvold on the Colbert Report, talking about another one of his ventures, an opus on the science of cooking, which teaches you how to do things like make ice cream with liquid nitrogen. Myhrvold is the kind of guy the press loves to profile.

Colbert: You are a polymath. You're a Renaissance man. You're a world BBQ champion now. You've discovered T-Rex fossils. You've studied quantum

physics with Stephen Hawking. And you have a new six-volume, 40 pound, \$625 book called “Modernist Cuisine.”

Laura: But this image of Nathan Myhrvold, who gives TED Talks and generally plays the role of an avuncular elder statesman for the tech industry, is at odds with the image of his company, Intellectual Ventures.

Alex: There’s an influential blog in Silicon Valley called TechDirt that regularly refers to Intellectual Ventures as a patent troll. Another blog, IP Watchdog, called Intellectual Ventures “patent troll public enemy #1.” And the Wall Street Journal’s law blog had an article about Intellectual Ventures titled “Innovative Invention Company Or Giant Patent Troll?”

Laura: These articles talk about how IV has amassed one of the largest patent portfolios in existence. How it’s going around to technology companies demanding money to license these patents. But the thing is, people at companies that have been approached by Intellectual Ventures won’t talk about it:

Sacca: There is a lot of fear about Intellectual Ventures. You don’t want to make yourself a target.

This is Chris Sacca. An entrepreneur and venture capitalist in Silicon Valley, who was an early investor in companies like Twitter and FanBridge and lots of other startups. He wouldn’t say if Intellectual Ventures had been in contact with his companies.

Sacca: I tried to put you in touch with other people in this community to talk to you about this and they almost uniformly said they couldn’t talk to you. They were afraid to.

Alex: And we should just cut in here and say, when Chris says “this community,” he’s talking about the community of multi-millionaire venture capitalists that he hangs around with. Not a timid crowd. Back to Chris.

Sacca: They almost uniformly said they couldn’t talk to you. They were afraid to. And they didn’t even hem and haw about it. They just said they’re afraid to talk about this on the record. It’s such a mismatched fight that your best defensive option is security by obscurity. They have the potential to literally obliterate startups.

Myhrvold: Intellectual Ventures is a company that invests in invention.

Laura: This, of course, is Nathan Myhrvold. I went to talk to him, and spend a day at his company. And not surprisingly, Nathan Myhrvold had a very different story about what he’s up to.

Laura: Are you a patent troll?

Myhrvold: [laughs] Well, that's a term that has been used by people to mean someone they don't like, who has patents. I think you would find almost anyone who stands up for their patent rights has been called a patent troll.

Alex: Intellectual Ventures, says Myhrvold, is just the opposite. They're on the side of the inventors. They pay inventors for patents. Then gather patents together into this huge warehouse of invention that companies can use if they want. Sort of like a department store for patents. Whatever technology you're looking for, Intellectual Ventures has it.

Laura: And when reporters come to visit Myhrvold, to underline this idea that IV is all about invention, he takes them to see this:

[lab ambiance]

Dean: Out here we're standing on the brink of our machine shop

Laura: I'm on a tour with Jeff Dean, who runs the Intellectual Ventures Invention Lab. About 100 people work here. The lab is massive. There are people walking around in white lab coats mixing chemicals in beakers and looking at stuff under microscopes.

There's a machine shop, a nanotechnology section. It's like a playground for scientists and engineers.

Alex: And if you ask them what have they invented so far, there's a couple things they point to: a nuclear technology they say is safer and greener than existing technologies; a cooler that can keep vaccines cold for months without electricity...

Laura: And, the world's most high-tech mosquito zapper, which senses mosquitoes from hundreds of feet away by detecting the speed of their wings:

Dean: Where on one side you have a reflector, on the other side you have something that's looking down range at the reflector. And any time a mosquito flies between there, it finds the mosquito and shoots it out of the air as fast as you can imagine. So it takes about a tenth of a second for it to find the mosquito, identify it as a mosquito, and kill it.

Alex: Like a missile defense shield, for mosquitoes.

Laura: But the fact is, this lab is a tiny fraction of what the company does. Intellectual Ventures has received a little over 1000 patents on stuff they've come up with here, which pales in comparison to the more than 30,000 patents they've bought from other people. In fact, nothing that's come out of this lab — not the mosquito zapper, not the nuclear technology — nothing has made it into commercial use.

Alex: But Intellectual Venture says, that's not our job. Our job, they say, is to encourage invention. For example, imagine an inventor out there, someone with a brilliant idea, a breakthrough. This inventor has a patent, but still, companies are stealing his idea. And he doesn't have the money or legal savvy to stop them. That's where Intellectual

Ventures comes in. They buy this inventor's patent, and they make sure that companies who are using the idea, pay for it.

[music]

Laura: A lot of people I met at IV told me some version of this story. We are promoting innovation by supporting inventors. And when I asked for an example of an inventor in this situation, someone with a breakthrough, who wasn't getting paid for it, two separate people pointed me to the same guy.

Chernesky: There's one story I can think of, a gentleman named Chris Crawford.

Laura: This is one of the people who mentioned Chris Crawford, Joe Chernesky, a vice-president at Intellectual Ventures.

Chernesky: The neat thing about Chris is, he had no idea how to get money for his patents. He had this great idea. These patents were immensely valuable because every technology company was adopting the technology. Yet he didn't know how to get paid. He eventually found Intellectual Ventures. So we bought those patents.

Laura: So, I figured, I want to talk to this guy. Not so simple. It turned out trying to talk to Chris Crawford led us on a five-month odyssey, where things didn't exactly fit the story Intellectual Ventures was telling us.

[music]

Laura: It started when I called Intellectual Ventures to get Chris Crawford's contact info. I got a strange e-mail back in response. I was told they no longer owned Chris Crawford's patent. And I was told, he probably wouldn't want to talk to me right now because he was in the middle of litigation.

Alex: That just made us curious, so we started digging around. We found Chris Crawford in Clearwater, Florida, but as predicted, he never responded to our many e-mails and phone calls. You will never hear from him in this story. We were able, though, to locate his patent.

Laura: Patent number 5771354. He got it in 1998, back in the relatively early days of the Internet. And the way IV explained the patent to us, Chris Crawford invented something that we all do all the time now. He figured out a way to upgrade the software on your home computer over the Internet. So in other words, when you turn on your computer and a little box pops up and says, "Click here to upgrade to the newest version of iTunes" – that was Chris Crawford's idea.

Alex: But when we looked at the patent, it seemed to claim a lot more than that. The patent says this invention makes it possible to connect to an online service provider to do a bunch of stuff: software purchases, online rentals, data back ups, information storage. The patent makes it seem like this one guy — Chris Crawford — invented a lot of what

we do on the internet every day.

We weren't sure what to make of all this, so we turned to an expert.

Martin: You're going to start by looking at the left- and right-hand screens.

Laura: This is David Martin, who runs a company called M-CAM. They're hired by governments, banks, business to assess patent quality, which they do with this fancy software program. We asked him to assess Chris Crawford's patent.

Martin: Now if you would, please just click on the patent number itself, Laura.

Alex: The software program actually scans through millions of patents and analyzes them to see if any of them overlap

Martin: That's a bad number.

Laura: An idea being patented is supposed to be non-obvious to a person of ordinary skill in the art. What that means is you shouldn't be able to get a patent just for a common-sense, good idea. It has to be a breakthrough.

Martin: That's correct.

Laura: In other words, we shouldn't be seeing what we are seeing on David Martin's computer screen.

Martin: 5,303 patents that were issued while his was being prosecuted, which covered the same material. 5,303.

Alex: And so that means at the same time Chris Crawford's patent was getting issued...

Martin: Only 5,303 people were pursuing the same thing.

Alex: And when you say the same thing...

Martin: I mean: The. Same. Thing.

Laura: David Martin may be exaggerating a little here for effect, but as we look through some of the patents that are on his screen, the resemblances are pretty clear. Remember, Chris Crawford's patent is for "an online back-up system."

Alex: And on David Martin's computer screen, we see lots of patents with slightly different language, but covering essentially the same idea. For example patent number 6003044 for "efficiently backing up files using multiple computer systems." Patent 5933653 for "mirroring data in a remote data storage system." And then there were three different patents with three different patent numbers but that all had the same title, "System and Method for Backing Up Computer Files Over a Wide Area Computer Network."

Laura: David Martin says when he first started looking into this stuff, and saw all these patents that were granted for essentially the same thing:

Martin: We thought that would be an anomaly. And then we were told, “Oh no it’s not an anomaly. That happens.” So that’s what got us into the rabbit hole you’re about to see, which is to say, “let’s see how many times that happens.” And as I’ve testified in Congress, that happens about 30 percent of the time in U.S. patents.

Alex: That is 30 percent of U.S. patents are essentially for things that have already been invented.

Martin: So for example toast becomes the “thermal refreshing of a bread product.”

Laura: These are real patents?

Martin: Yes.

Alex: There’s a patent on toast?

Martin: Yes, thermally freshened bread, not on toast.

Laura: Ladies and gentlemen, patent number 6080436, “Bread Refreshing Method,” issued in... 2000.

Alex: And we talked to another expert who told us Chris Crawford’s patent was similar to the toast patent in one respect:

Rick McLeod: None of this was actually new.

Alex: Rick McLeod is a patent lawyer and former software engineer, who we also asked to evaluate Chris Crawford’s patent. So he went on a search. This is how patent lawyers research this kind of thing. He looked to see if anyone else in the field was already doing the thing Chris Crawford claimed to invent in 1993, when he first filed his patent.

McLeod: There were institutions, both academic and businesses, that used computers in this way, and I think it’s a very interesting collection of things that were well known in the 1980s. With the exception that it adds on the word “Internet.”

Laura: Do you think this patent should have been issued in the first place?

McLeod: No. I don’t.

[music]

Alex: And in fact, for a long time, the Patent Office wouldn’t have agreed with Rick

McLeod. The Patent Office used to be very reluctant to grant patents for software. For decades, it considered software to be like language. Software programs were more like books or articles. You could copyright them. But you couldn't patent them. They weren't inventions, like the cotton gin.

Laura: But then the federal courts stepped in and started chipping away at this interpretation. There was a big decision in 1994, and another one in 1998, which rejected the Patent Office's view. The Patent Office got the memo and a flood of software patents followed. A lot of people in Silicon Valley wish that that had never happened, including a very surprising group — software engineers.

Brunner: I have to say, I worked on a whole bunch of patents in my career over the years and I have to say that every single patent is nothing but crap.

Laura: This is Stephan Brunner, a programmer. He said something we heard from a lot of software engineers. His software patents don't even make sense to him.

Brunner: I can't tell you for the hell of it what they're actually supposed to do. The company said we have to do a patent on this. Then they send in a lawyer and you basically say, "That's probably right, that's probably wrong." And they just write something that makes no sense. I personally, when I look at them, I'm not proud at all because most of them, it's just like mungo mumbo jumbo, which nobody understands and makes no sense from an engineering standpoint whatsoever.

Alex: Stephan Brunner, patent 7650296, "a configurator using structure and rules to provide a user interface." One sample section – and trust me, the whole thing's like this – "According to one embodiment of the invention, a customizable product class is created. ... A component product class is added to the customizable product class, where the component product class is a subclass of the customizable product."

Laura: In polls, as many as 80 percent of software engineers say the patent system actually hinders innovation. In other words, it does exactly the opposite of what it's supposed to do. It doesn't encourage them to come up with new ideas and create new products, it actually gets in their way. Here's another programmer, Adam Cohen:

Cohen: I worked for a company, which I'm not gonna say, that at the end of the company we tried to patent – we did successfully patent – our software that we made, and that patent is really meaningless because everybody that has an Internet website basically almost today, breaks, uses the stuff we patent to make their website work. Almost everybody.

Alex: This, we heard, happens all the time. Patents that are so broad, everyone's guilty of infringement, which causes huge problems for almost anyone trying to start or grow a business on the Internet.

Sacca: We're at a point in the state of intellectual property where existing patents probably cover every behavior that's happening on the Internet or our mobile phones today.

Laura: This again is Chris Sacca, the investor you heard from earlier who helped lots of companies, including Twitter, get off the ground.

Sacca: So I have no doubt that the average Silicon Valley start-up or even medium-sized company, no matter how truly innovative they are, I have no doubt that aspects of whatever they're doing violate patents that are out there right now. And that's what's fundamentally broken about this system right now.

[music]

Alex: And this brings us back to patent 5771354, Chris Crawford's patent, the patent Intellectual Ventures pointed us to as an example of how they encourage innovation. As we've said, this patent also seems to cover a big chunk of what's happening on the Internet — upgrading software, buying stuff online, what's called cloud storage (storing data on the Internet). If you have a patent on all that, you could sue a lot of people. Make a lot of money.

Laura: And in fact, that's what's happening with Chris Crawford's patent. Intellectual Ventures sold it to another company, a company called Oasis Research, in June of 2010. Less than a month later, Oasis Research used the patent to sue 16 different tech companies. Companies like Rackspace, Go Daddy, and AT&T. Companies that do cloud storage.

Answering Machine: You have reached Oasis Research. At the tone please leave your name, your telephone number...

I called the number on Oasis's website numerous times. But an actual human being never picked up. For a while the message directed all questions to a lawyer in New York, named John Desmarais. He also didn't return our phone calls.

Although I did track him down, at a conference in San Francisco. I ran up to him right after a talk and asked him what he could tell me about Oasis Research.

Desmarais: I can't talk about folks I represent.

Laura: Do you know who owns Oasis Research to reach them?

Desmarais: Yes, but I'm not going to tell you. [laugh]

Laura: You literally... here they're bringing a suit and you can't tell us who owns the company?

Desmarais: I'm not gonna answer questions about pending lawsuits for you.

Laura: Another question, is there any chance at a later date of talking to you more generally?

Desmaris: I don't think so. But thanks for asking. Although I love NPR and I love the work you guys do.

[music]

Alex: Behavior like this makes it hard not to think, are you hiding something? When someone says, "Yes I know, but I'm not going to tell you" it really makes you want to find stuff out. There was hardly any public information about Oasis Research. Minimal corporate filings. No way to know who owned it, how many employees it had. If it even had employees at all.

One of the few details that was available: an address, in Marshall Texas. 104 East Houston Street, Suite 190.

Smith: Right now we're going into the first floor of the Baxter Building, which is 104 East Houston.

Laura: This is Michael Smith. He's an attorney in Marshall, Texas, who does mostly patent cases. He agreed to show us the offices of Oasis Research. They're in a nondescript two story building on the town's main square, two doors down from the federal courthouse. He led us into a narrow corridor lined with doors with gold and black office name plates.

Smith: And we here go. Suite 190. Oasis Research, LLC.

Alex: We arrived on a weekday, not a holiday, but the door was locked. Through the crack under the door you could see there were no lights were on inside. Marshall is a very small town, 24,000 people. Michael was born and raised here, so we started quizzing him about Oasis:

Laura: Does it have any employees that you know about?

Smith: Not that I know of.

Laura: Have you ever seen any people coming in and out of that office?

Smith: No, I haven't.

Alex: Is this office ever occupied?

Smith: I doubt that it is.

Laura: If you don't mind, I'm gonna knock on the door and see if there's anyone here today. [knock]

Alex: I know this is kind of a cliché at this point, knocking on the door of the suspected

fake office.

Laura: Nothing.

Alex: But we'd flown a long way.

Laura: But I will say, standing in that corridor was eerie. All the other doors looked exactly the same: locked, nameplates over the door, no light coming out. It was a corridor of silent, empty offices.

Smith: Right next to Software Rights Archive, Bulletproof Technology of Texas, Jellyfish Technology of Texas and a couple of others that I recognize as plaintiffs in cases that we're involved in here.

Laura: Are there a lot of companies like this here in east Texas?

Smith: Yes.

Alex: And we're standing in a whole corridor of them it seems like.

Smith: Yes. This would be ground zero, yes.

[music]

Laura: So what's going on here? It turns out, a lot of those companies in that corridor, maybe every single one of them are doing exactly what Oasis Research is doing. They appear to have no employees. They are not making new inventions here. They're filing lawsuits for patent infringement.

Patent lawsuits, says Michael Smith, are big business in Marshall, part of the eastern district of Texas. Walking back across the town square, past the Eastern District Court House, Michael explained it:

Smith: The Eastern District, in the last few years, has been either number one or number two or three in the nation in numbers of patent cases. The list of the patent cases at this courthouse would be about 2,000 cases long.

Laura: As we walk past the courthouse, as if to drive the point home, a gaggle of lawyers, emerges. Dozens and dozens of dark suits in the hot Texas sun.

Smith: They're taking their mid-morning break during a patent trial that started yesterday morning in front of Magistrate Judge Everingham.

Laura: It's quite something to see. In this case, it's mostly men in suits, a couple women, just streaming out of that court house one after another, this little federal courthouse.

Smith: Oh yeah, they travel in packs.

Alex: We talked to many people about why this is so, why do all these New York- and San Francisco-based companies come to tiny Marshall to battle in court.

Laura: Many people say that it has to do with juries in Marshall, they're famously plaintiff-friendly, friendly to patent owners trying to get a large verdict. But Michael Smith, who's argued on both sides of numerous patent cases, says that might have been true once, but not anymore.

Alex: He says they're in Marshall because of the drug war. Basically in the '90s, federal courts everywhere were clogged with drug cases. Civil cases like patent cases couldn't get in front of a judge, because criminal cases take precedence. So companies with patent suits had to find a spot with fewer criminals to prosecute. Hence, sleepy Marshall Texas.

[music]

Alex: Our visit to Marshall made us realize something big is going on here in Texas, and Oasis research is part of it. Two thousand lawsuits making the same essential claim Intellectual Ventures makes — there's an inventor whose invention is being stolen, used without permission. But there were no inventors here, just corridors of empty offices and a lot of lawyers. That made us wonder: what else about Intellectual Ventures is not what it appears to be?

Ira Glass: Alex Blumberg and Laura Sydell. Coming up, we go back to Intellectual Ventures for answers. And we find out what a patent has in common with a weapon of mass destruction. That's in a minute, from Chicago Public Radio and Public Radio International, when our program continues.

[music]

Ira: It's This American Life from I'm Ira Glass. Today on our show: When Patents Attack! Stories about how our patent system sometimes seems to be discouraging rather than encouraging innovation in high tech businesses.

A quick review of where we are in our. OK, there's this company called Intellectual Ventures. They told our reporters they, if they wanted to understand what the company was all about, should talk to this inventor that Intellectual Ventures helped out. The guy is a patent holder named Chris Crawford.

But when our reporters tried to contact Chris Crawford, he won't return any phone calls, he won't return e-mails. We find out his patent has actually been sold by Intellectual Ventures. They no longer own it. It is now being used to sue over a dozen different tech businesses. And the company doing the suing, called Oasis Research, has no researchers, no employees of any kind that we can find, and it's only place of business seems to be an empty office in a corridor of empty offices in a small town in Texas.

So our reporters, Laura Sydell and Alex Blumberg, had a lot of questions.

Laura: Some of the questions seemed like they should have been simple to answer, but they weren't. For example, when did Intellectual Ventures actually buy the patent from Chris Crawford? There's a document that's publicly available on the U.S. Patent Office website, it traces a patent's ownership history. In the case of Chris Crawford's patent, though, the ownership history is really hard to understand.

Alex: The first owner is clear, it's Chris Crawford, who was granted the patent in 1998. And then, it's clear that a company named Intellectual Ventures Computing Platforce Assets, LLC. — no one could actually tell us what a “platforce” is — bought the patent in July of 2010. But in between those two dates, there are two other owners. A company called Kwon Holdings and another one named Enhanced Software, LLC. And what was odd, Kwon Holdings, Enhanced Software and Intellectual Ventures all have the same address.

Laura: We went back to Intellectual Ventures to clear some of this stuff up. Now, there's one thing we need to explain before we tell you what happened there. Remember the guy at the very beginning of our story? Peter Detkin, the guy who coined the term “patent troll” after his daughter's doll, the guy who hates patent trolls. You'll never guess what he's doing now.

Detkin: I'm a founder and vice-chairman of Intellectual Ventures here in Silicon Valley.

Alex: That's right, the guy who coined the term patent troll teamed up with Nathan Myhrvold to start a company that many people call the biggest patent troll out there. Peter Detkin obviously disagrees with this characterization.

Laura: So anyway, we went to Peter Detkin to ask our questions, and we started off by showing him that publicly available page on the U.S. Patent Office website and we asked him what seemed like a pretty straightforward question. When exactly did Intellectual Ventures buy Chris Crawford's patent? Turns out this was the question that completely threw him off, and led the PR woman who was in the room with us to jump in and to try and shut down the interview. You'll hear her voice in the background.

Alex: This is just the patent history of Chris's patent. So could you just... so here ... and honestly we just don't understand this, so if you could explain what, what we're looking at here? So he invented it in 1998 ...

Detkin: Let me put on my reading glasses on. So I'm struggling a little bit here.

Laura: Right, so he invented this first ...

PR Woman: I don't know that going into the history of this patent is necessary or useful -

Detkin: Well, I don't know where you're going with this. What's the question? What are you trying to find out?

Alex: If you could explain ... the story you're telling is that you bought this patent from this inventor Chris Crawford and then you sold it a little bit later. But then if actually you look at the history, it's very different story. It seems very different. So I'm trying to figure out like if you could explain to us...

Detkin: I won't be able to tell you by looking at this. I mean I'd have to talk... I'm not an expert ... your on the USPTO website? I haven't looked at this particular website in a while. I don't know how it's organized. So I mean, I'm trying to be helpful, but the fact is I know we bought it from some entity of his and apparently we then sold it. And again, I have some vague recollection of us doing that deal.

Alex: Wait, are you telling me you're the... you run a patent company and you were the head council for Intel in the patent department and you don't know the Patent Office website... you don't know how to read this?

Detkin: Look, I mean I could look at this if you want. I could ... but I haven't looked at this particular website, and I don't know how it's organized. And I'm not exactly sure what it is you're trying to get at. I'm happy to answer questions, but if you're going to cross-examine me on the record –

Alex: It's just, it's just confusing

Detkin: ... about a patent website, I don't think that's quite fair.

Alex: So for example, one question is when was it sold to Intellectual Ventures because it's sold a number of times, but it sold a number of times to different companies with the same address as Intellectual Ventures. Does that mean it was sold to Intellectual Ventures or not?

PR Woman: It's a little different and we're not gonna talk about this.

Detkin: Yeah, I have no idea. There's no way without knowing the details of this particular deal I could ever possibly answer that question.

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Alex: Laura, we were honestly surprised at this response. It wasn't like this was a secret document or something. What was the big deal about answering this seemingly simple question?

Laura: Part of it certainly was that we took him a little bit by surprise. I take him at his word that they do a lot of deals and he doesn't know the details of every one. But we talked to another guy, an intellectual property lawyer named Tom Ewing, who suggested there might have been more to it than that.

Alex: Tom Ewing told us those other companies listed on that Patent Office document,

Kwon Holdings and Enhanced Software, they might very well be Intellectual Ventures. What he calls Intellectual Ventures' "shell companies." Tom Ewing makes a business of tracking them. He started it as a sort of a private challenge to himself:

Ewing: I heard for the longest time when they first started that they hid everything in shell companies and no one could ever find it. And I kept hearing that so much and it irritated me because I figured that I could, if I just sat down and started looking. So I did.

Laura: How many shell companies do you personally believe that Intellectual Ventures has, based on your research?

Ewing: Very close to 1,300.

Laura: So we asked Tom Ewing what seemed like an obvious question. Is Oasis Research a shell company of Intellectual Ventures? And he said, probably not.

Alex: Tom said Oasis more likely falls into a second category, companies that are independently owned, but with close links to Intellectual Ventures. For example, John Desmarais, the lawyer representing Oasis, also represents Intellectual Ventures in lots of cases and has links to that company going back almost a decade.

Laura: And, Tom said there's evidence that Intellectual Ventures might be getting a cut of whatever money Oasis receives from its lawsuits. He shows us a document that's called a Certification of Interested Parties.

Alex: The court in Texas required that Oasis list all the entities who have a financial stake in the outcome of the case. This is a standard form that pretty much all plaintiffs in civil cases have to file. Oasis listed the parties that most people list: the plaintiff, the defendants, the attorneys involved. But it added one other name: Intellectual Ventures.

Laura: So we went back to Intellectual Ventures one more time to talk to Peter Detkin. We picked up where we left off the last time. When did Intellectual Ventures actually buy Chris Crawford's patent? And this time, he had no hesitation about explaining it. It turns out, Tom Ewing had been right. Those other mysterious companies, Kwon Holdings and Enhanced Software, they were Intellectual Ventures' shell companies:

Detkin: This is when we bought it. October of 2007 from CMC Software to Kwon Holdings. And Kwon is a company that we created to purchase these assets. Then when we actually struck a deal and prepared to sell it in the name of transparency, we changed it to the Intellectual Ventures Computing Platform Assets, please don't ask me what a "platform" is. I don't know what it is. Then in August of 2010 we sold it to Oasis Research.

Alex: We showed Detkin that court document from the Oasis case, listing Intellectual Ventures as an interested party.

Detkin: OK, and it does list the Intellectual Ventures Computing Platforce Assets as an interested party. I see that.

Alex: And you don't know why in this instance you're listed?

Detkin: I believe it's because we likely have a back-end arrangement here.

Alex: What does a back-end deal mean?

Detkin: We sell for some amount of money up front and we get some percentage of the royalty stream down the road that is generated from the monetization of these assets.

Alex: So just to spell this out: Peter Detkin is saying it's likely that Intellectual Ventures is taking a cut of whatever money Oasis gets from its lawsuits. Oasis, a company with no operations, no products, and as far as we can tell no employees, whose only activity seems to be taking a very broad patent from 1998 and using it to sue over a dozen Internet companies today.

Laura: And so we asked him. How does it feel making money from an entity which is behaving a lot like the patent trolls that he once condemned?

Detkin: These are patents we used to hold, we no longer hold. And we ensure that we have no control over the actions of these third parties. They are independent actors. They're not Intellectual Ventures. They may be monetizing in ways that we disagree with but it's not our call. It's their's.

Alex: But you're also still getting paid.

Laura: Yeah, I sort of feel like, 'Yeah well, but what do you expect?' You must have some knowledge that it's highly likely these people are gonna go and bring lawsuits, especially since they're companies that only have these largely run by attorneys.

Detkin: Sure, no, I understand and I'm not disputing any of that. What I'm trying to say, and I apologize if I'm not being clear, is that we do believe, we believe in our heart that litigation is a highly inefficient way to do licensing. But let's not lose sight that litigation is just licensing by other means.

Alex: In other words, we try to license these patents in a friendly way. But sometimes you have to sue.

Laura: Peter Detkin then repeated the company line that'd we heard from a lot of people at IV — that the mission of Intellectual Ventures is to help inventors bring great ideas into the world. That lots of inventors, they're like great artists, brilliant but not brilliant at business. So their patents languish. IV gets their ideas into the hands of companies who'll actually build what they've invented.

Alex: So can you point me to a patent that you acquired that was languishing but then got licensed to somebody and built in a way that I could see?

Detkin: I can tell you that it's happened, but unfortunately the deal is confidential. There are two deals that were done. One was with a toy company. The other was, I can't remember the technology of the other one but they came to us and they said we're interested in this particular patent. We'd like to take it out into the world. Will you give us a license? And we did. And they put it out there. It was out there for last Christmas. I actually don't know how it's done. I would be curious to find out myself. But I agree, that's an anomaly. I see where you're going with your question and I don't mean to fight you on it. The fact is the bulk of our patents, the bulk of our revenue is from people using inventions... they were using it before we bought it and they were using it after we bought it, but we provided an efficient way for them to get access to those invention rights.

Alex: The way I hear what you're saying, the way I translate it in my head, is they were using it before without paying a license and nobody was bothering them. And now they are paying a license to you. Why is that a better situation?

Detkin: Well, because we want to incentivize the guy who invented it.

Alex: That is, if companies pay their licenses, inventors make more money. Which in turn gives them incentive to invent more stuff. This is the rhetorical cul-de-sac where every argument with Peter Detkin ends. But here's the problem with that argument. IV is not buying inventions. They're buying patents. And as we've heard, as most software engineers will tell you, at least when it comes to computers and the Internet, a patent and an invention are not the same. Lots of patents cover things that people in the field wouldn't consider inventions at all.

Laura: And these patents out there that aren't for something novel or are so broad they can cover anything? Every single one of them can be used to bring lawsuits. In response, all the big tech companies have started amassing troves of software patents, not to build anything, but to defend themselves. If a company's patent horde is big enough, it can say essentially, if you try to sue me with your patents, I'll sue you with mine.

Alex: It is the old mutually assured destruction. Except instead of arsenals of nuclear weapons it's arsenals of patents. And this was a problem Intellectual Ventures founder Nathan Myhrvold said he was trying to solve when he first started his company. A problem that he and others from Intellectual Ventures talked about at investor meetings all around Silicon Valley. Chris Sacca was there at one of them.

Sacca: I think I saw Nathan for the first time present the idea of Intellectual Ventures in either the fall of 2007 or the spring of 2008.

Alex: And the pitch he heard was basically, Intellectual Ventures helps defend against lawsuits. Intellectual Ventures has this horde of 35,000 patents — 35,000 patents that, for a price, companies can access and use to defend themselves.

Sacca: They pay administrative fees ranging from the tens of thousand to the millions and millions of dollars, all into this entity to kind of buy themselves insurance that protects them from being sued by any harmful, you know, malevolent outsiders.

Alex: In other words, Intellectual Ventures goes around to companies and says, “Hey, you wanna protect yourself from lawsuits? We own tons of patents. Make a deal with us. Our patents will not only cover everything you’re doing in your business, no one will dare to sue you.”

Laura: But to Chris Sacca, there’s an implication in there: “If you don’t join us, who knows what’ll happen?”

Which reminds him of the business practices of another organization.

Sacca: A mafia style shakedown, where someone comes in the front door of your building and says, “It would be a shame if this place burnt down. I know the neighborhood really well and I can make sure that doesn’t happen.” And saying, “Pay us up.” Now here’s, here’s what’s funny. If you talk to ... when I’ve seen Nathan speak publicly about this and when I’ve seen spokespeople from Intellectual Ventures, they constantly remind us that they themselves don’t bring lawsuits, that they themselves are not litigators, that they’re a defensive player. But the truth is that the threat of their patent arsenal can’t actually be realized, that it can’t be taken seriously unless they have that offensive posture, unless they’re willing to assert those patents. And so it’s this very delicate balancing act that is quite reminiscent of scenes you see in movies when the mafia comes to visit your butcher shop and they say to you, “Hey, it would be a real shame if somebody else came and sued you. Tell you what, pay us an exorbitant membership fee into our collective and we’ll keep you protected that way.” A protection scheme isn’t that credible unless some butcher shops burn down now and then.

Alex: We told Intellectual Ventures that Chris Sacca compared their business to a mafia shakedown and in an e-mail, Peter Detkin called that ridiculous and offensive. He then reiterated some of the arguments you’ve heard about how IV protects inventors and went on to say, “We’re a disruptive company that’s providing a way for patent-holders to recognize value.” (By “recognize value,” he means “make money.”) “That wasn’t available before we came on the scene, and we are making a big impact on the market. That obviously makes people uncomfortable. But no amount of name-calling changes the fact that ideas have value.”

Laura: True enough, but lately it seems like a lot of butcher shops have been burning. As we were reporting this story, more and more Intellectual Ventures patents started showing up in the hands of companies like Oasis, companies without employees or operations, who were formed for the purpose of filing lawsuits. They’re known as non-practicing entities or NPE’s.

Alex: One former IV patent was used by an NPE to sue 19 different companies, a seemingly random assortment, which included Dell computers, Abercrombie & Fitch,

Visa, UPS. What's the suit about? These companies all have websites that when you scroll your mouse over certain sections, pop-up boxes appear. This NPE said, "we have a patent on that."

Laura: Another group of former IV patents is being used in one of the most controversial and most talked about cases in Silicon Valley right now. An NPE called Lodsys is suing almost three dozen companies and counting. These are small- and medium-sized companies developing apps for iPhone and Android smartphones. Lodsys says every time you buy something within a smartphone app, they own the patent on that.

Alex: And one interesting wrinkle about that case. The address of Lodsys? 104 East Houston Street, Marshall, Texas, Suite 190. The same exact address, down to the suite number, as Oasis Research.

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Laura: Tom Ewing, the lawyer who keeps track of Intellectual Ventures, says that all this behavior has led people to come up with a special name for the company.

Ewing: "The troll on steroids."

Laura: Do you think it's a troll on steroids?

Ewing: You know, I don't want to complicate things, but I personally think there's a whole lot of gray. For example, they've already collected \$2 billion dollars worth of royalties, so they say. And you have to ask yourself of the \$2 billion dollars in royalties they've collected, how much of those royalties that they've collected are based on sort of reasonable licensing fees that the people they received it from should have paid? And how much of it is simply based on trying to avoid litigation? And I would say it's probably a mix of both.

Laura: The problem is to try and figure out what that actually mix looks like is virtually impossible. We called dozens of people. We called people who had licensing arrangements with Intellectual Ventures. We called people who were defendants in lawsuits involving Intellectual Ventures' patents. We called every single company being sued by Oasis Research, all 16 of them. No one would talk to us. Partly this is fear. Partly, Intellectual Ventures is said to have the strictest non-disclosure agreement in Silicon Valley.

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Alex: The Oasis Research case is still ongoing but many of the original defendants seem to have settled. Michael Smith, the attorney in Marshall, Texas, who showed us the Oasis offices, represented one of those defendants. He was pretty sure they would have won the case if they'd gone to trial. But his client settled anyway. He says sometimes it makes more sense to settle and pay a license fee than to spend \$2 to \$5 million on a court case.

Alex: Tom Ewing, the lawyer who tracks Intellectual Ventures, says it's likely we're

going to see plenty more of these cases in the future. And that's based just on the math of IV's business model. In order to purchase its 35,000 patents, Intellectual Ventures got money from investors. A lot of money. More than \$5 billion dollars.

Laura: And a lot of these investors are venture capitalists who expect very high returns. These are people who are looking for the next Google, the next Apple. People who want to get back many times what they put in. Since its founding in 2000, Intellectual Ventures has generated \$2 billion dollars in revenue. But to keep its investors happy, over the next 10 years, says Tom Ewing, they're going to have to do a lot better than that.

Ewing: So if you calculate this out, that means that over say a 10-year period they're going to need to collect about \$35 billion dollars in licensing revenue, in order for them to be successful among the people who they're trying to compare themselves with. IV seems to have signed a number of deals. If the stream of deals they're signing doesn't increase significantly, then I would imagine they will be forced to file more litigations in order to achieve their revenue targets.

Laura: Tom's prediction already seems to be coming true. Earlier this month, Intellectual Ventures itself filed a patent-infringement suit in federal court against several companies it claimed were infringing some patents it owns.

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Laura: In early July, the bankrupt tech company Nortel put its 6,000 patents up for auction as part of a liquidation. A bidding war broke out between the Silicon Valley powerhouses. Google said in press accounts that it wanted the patents purely to defend itself against lawsuits and it was willing to spend over \$3 billion dollars to get them. But that wasn't enough. The portfolio eventually sold to Apple and a strange consortium of other tech companies, including Apple competitor Microsoft.* The price tag? 4.5 billion dollars. Five times the opening bid. More than double what most people were expecting. The largest patent auction in history.

Alex: Think of that — 4.5 billion dollars on patents that these companies almost certainly don't want for their technical secrets. That 4.5 billion dollars won't build anything new, won't bring new products to the shelves, won't open up new factories that can hire people who need jobs. That's 4.5 billion dollars that adds to the price of every product these companies sell you — 4.5 billion dollars essentially wasted, buying arms for an ongoing patent war. The big companies, Google, Apple, Microsoft, will probably survive this war. The likely casualties, the companies out there now that no one's ever heard of that could one day take their place.

Alex Blumberg with NPR correspondent Laura Sydell. Alex is part of our Planet Money Team. On the Planet Money website you can find links to all kinds of documents and patent-related goodies. Plus, of course, their podcast. That is at NPR.org/money.

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Our program was produced today with Ben Calhoun, Jane Feltes, Sarah Koenig, Eric

Mennel, Jonathan Menjivar, Lisa Pollak, Robyn Semien, Alissa Shipp and Nancy Updike. Our Senior Producer is Julie Snyder.

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WBEZ management oversight for our show by our boss, Mr. Torey Malatia. You know, I thought he'd be so proud of our program this week:

I'm not proud at all because it's just like mungo mumbo jumbo, which nobody understands whatsoever.

I'm Ira Glass. Back next week with more stories of *This American Life*.

* The broadcast version of this story misidentified one of the winning bidders as Nokia. We regret this error.

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