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TRANSCRIPT

441: When Patents Attack! Transcript

ORIGINALLY AIRED 07.22.2011

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Prologue.

Ira Glass Back during the rise of the dot coms and the internet, Jeff Kelling and a few of his friends were working as programmers together at this company in Dallas. And they decided they wanted to get together the way the tech geeks were doing all over the world at the time and come up with an idea for their own internet company to start.

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

Ira Glass And this is 1999. This is before Flickr, this is before Shutterfly. But Jeff and his friends, they were not 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 startup was doing well enough that they could all quit their day jobs and do that full-time. Their company was called FotoTime-- that's FotoTime with an F. Just as they were living the dream, entrepreneurship, their own business, until--

Jeff 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 IRS 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.

And we were wondering, 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.

Ira Glass 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 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 they thought he'd stolen from them. Had he accidentally come up with 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?

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Or was it that he hadn't stolen anything? 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.

Jeff 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 their technology.

Ira Glass But to go to court to answer that question was going to cost money, a lot of money.

Jeff Kelling It was between \$2 and \$5 million. 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.

Ira Glass 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 had 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 that he got along with it. He thought the people who bought his company would expand the company and 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.

David 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 Blumberg Right. And instead they waited for somebody else to build Flickr, and then they sued Flickr?

David Rose Yes.

Ira Glass 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.

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

FotoMedia, by the way, denies being a patent troll. Its CEO 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.

Jeff 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.

Laura Sydell Can I ask what that final settlement was, how much it was?

Jeff Kelling No. No, unfortunately, part of the terms of our settlement agreement is that we don't discuss the amount.

Alex Blumberg Did it put your business in danger?

Jeff 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.

Ira Glass 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, any time somebody 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. 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.

Act One.

Laura Sydell 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 Blumberg 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.

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

Peter Detkin So I had a contest inside Intel. The contest itself was named "The Terrorist." And these suggestions-- we got a lot of suggestions, but none really fit. But at the time my daughter was, I think, four or five and she liked playing with those little troll dolls. The original one, in fact, is still in my office. And so I turned to her and I said, oh, the story of a troll kind of

fits because the whole Billy Goats Gruff thing. It's someone lying under a bridge they didn't build, demanding payment from anybody who passed. I said, how about a patent troll?

Alex Blumberg 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%. Licensing fee requests, like what happened to Peter Detkin and to FotoTime, went up 650%.

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 Sydell I hear those 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 is universal.

Laura Sydell If I say patents system, what do you say?

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

Man 2 Complicated, broken.

Man 3 It's basically a flimflam game that anybody who knows how to take advantage of it is doing.

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

Man 4 I do, yeah. You want to hear a groan for the radio?

Laura Sydell Yeah, let's hear a groan.

Man 4 Grrrrr.

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

Man 5 Like Nathan Myhrvold, I guess, and whatever his company is. It has some stupid name, like Associate Associates or something like that, I don't know.

Laura Sydell 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.

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

Alex Blumberg This is Myhrvold on the television show *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.

Stephen Colbert You are a polymath. You're a Renaissance man. You're a world barbecue 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 Sydell 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 Blumberg There's an influential blog in Silicon Valley called *Techdirt*, which regularly refers to Intellectual Ventures as a patent troll. Another blog, *IPWatchdog*, called Intellectual Ventures patent troll public enemy number one. And the *Wall Street Journal's* law blog had an article about Intellectual Ventures titled "Innovative Invention Company Or Giant Patent Troll?"

Laura Sydell These articles talk about how IV has amassed one of the largest patent portfolios in existence. How it's going around the 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.

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

Laura Sydell 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.

Chris 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're afraid to.

Alex Blumberg And we should just cut in here and say when Chris says, "this community," he's talking about the community of multimillionaire venture capitalists that he hangs around with. Not a timid crowd. Back to Chris.

Chris Sacca They almost uniformly said they couldn't talk to you. They're afraid to. And they didn't even hem and haw about it. They just said, they're afraid to talk about this issue 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.

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

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

Laura Sydell Are you a patent troll?

Nathan Myhrvold 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 Blumberg Intellectual Ventures says Myhrvold is just the opposite. They're on the side of inventors. They pay inventors for patents. They gather these 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 Sydell And when reporters come to visit Myhrvold to underline this idea that IV is all about invention, he takes them to see this.

Geoff Deane Out here we're standing on the brink of our machine shop.

Laura Sydell I'm on a tour with Geoff Deane, 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 Blumberg And if you ask them what they've invented so far, there's a couple things they point to. The nuclear technology, they say, is safer and greener than

existing technologies. A cooler that can keep vaccines cold for months without electricity.

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

Geoff Deane Well, 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 actually 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 Blumberg Like a missile defense shield for mosquitoes.

Laura Sydell But the fact is, this lab is a tiny fraction of what the company does. Intellectual Ventures has received a little over 1,000 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 Blumberg But Intellectual Ventures 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 make sure that companies who are using the idea pay for it.

Laura Sydell 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.

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

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

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

It started when I called Intellectual Ventures to get Chris Crawford's contact info. I got a strange email back in response. I was told, "they no longer own 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 Blumberg 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 emails and phone calls. You will never hear from him in this story.

We were able, though, to locate his patent.

Laura Sydell 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 Blumberg 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 backups, 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 this, so we turned to an expert.

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

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

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

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

David Martin That's a bad number.

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

David Martin That's correct.

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

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

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

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

Alex Blumberg And when you say the same thing--

David Martin I mean the same thing.

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

Alex Blumberg 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 quote "efficiently backing up files using multiple computer systems." Patent 5933653, for quote "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 quote, "system and method for backing up computer files over a wide area computer network."

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

David 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, well, let's see how many

times that happens. And as I've testified in Congress, that happens about 30% of the time in US patents.

Alex Blumberg That is, 30% of US patents are essentially for things that have already been invented.

David Martin So, for example, toast becomes the thermal refreshing of a bread product.

Laura Sydell These are real patents?

David Martin Yes.

Alex Blumberg There's a patent on toast?

David Martin Yes, thermally refreshed bread, not on toast.

Laura Sydell Ladies and gentlemen, patent number 6080436, bread refreshing method, issued in 2000.

Alex Blumberg And we talked to another expert who told us Chris Crawford's patent was actually similar to the toast patent in one respect.

Rick McLeod None of this was actually new.

Alex Blumberg 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.

Rick 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 of it adds on the word internet.

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

Rick McLeod No, I don't.

Alex Blumberg And in fact, for a long time, the Patent Office would have agreed with Rick McLeod. The Patent Office used to be very reluctant to issue 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 Sydell But the federal courts stepped in and they 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.

Stephan Brunner I have to say I actually 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 Sydell 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.

Stephan Brunner I can't tell you for the hell of it what they're actually supposed to do. Because the company said we have to do a patent on this, and then they send in a lawyer. You basically say, that's probably right. That's probably wrong. And they just write something up. It makes no sense.

And personally when I look at them, I'm not proud at all because most of them again, it's just like mumbo jumbo, which nobody understands, and which makes no sense from an engineering standpoint whatsoever.

Alex Blumberg Stephan Brunner, patent 7650296 quote, "a configurator using structure and rules to provide a user interface." One sample section and trust me, the whole thing is 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 sub-class of the customizable product."

Laura Sydell In polls, as many as 80% 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.

Adam Cohen I work for a company, which I'm not going to 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, uses the stuff that we patented to make their website work. Almost everybody.

Alex Blumberg 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.

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

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

Chris Sacca So I have no doubt that the average Silicon Valley startup, 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.

Alex Blumberg 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 and make a lot of money.

Laura Sydell 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.

Operator You have reached Oasis Research. At the tone, please leave your name--

Laura Sydell 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.

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

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

John Desmarais Yes, I do. Yes, but I'm not going to tell you.

Laura Sydell I mean, they're bringing a suit and you literally can't tell us who owns the company?

John Desmarais I'm not going to answer questions about pending lawsuits for you.

Laura Sydell Another question. Is there any chance at a later date of actually talking to you more generally?

John Desmarais I don't think so, but thanks for asking. Although, I love NPR and I love the work that you guys do.

Alex Blumberg 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.

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

Laura Sydell 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.

Michael Smith And here we go, suite 190, Oasis Research LLC.

Alex Blumberg It was late morning on a weekday-- not a holiday-- but the door was locked. Through the crack underneath you could see there were no lights 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 Sydell Does it have any employees that you know about?

Michael Smith Not that I know of.

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

Michael Smith No, I haven't.

Alex Blumberg Is this office ever occupied?

Michael Smith I doubt that it is.

Laura Sydell If you don't mind, I'm going to knock on that door and just see if there's anyone here today.

Alex Blumberg I know this is kind of a cliché at this point, knocking on the door of the suspected fake office--

Laura Sydell Nothing.

Alex Blumberg But we'd flown a long way.

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

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

Laura Sydell Are there are a lot of companies like this here in East Texas?

Michael Smith Yes.

Alex Blumberg And we're standing in the whole corridor of them, it seems like.

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

Laura Sydell 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're 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 Courthouse, Michael explained it.

Michael 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 Sydell As we walked 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.

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

Laura Sydell It's quite something to see all these-- it is, in this case, it's mostly men in suits, a couple women just streaming out of that courthouse one after another, this little federal courthouse.

Michael Smith They travel in packs.

Alex Blumberg 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 Sydell Many people say it has to do with juries in Marshall. They are 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 Blumberg 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.

Our visit to Marshall made us realize, something big is going on here in Texas, and Oasis Research is part of it. 2,000 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. It 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.

Act Two.

Ira Glass It's *This American Life*. 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 story. OK, there's this company called Intellectual Ventures. They told our reporters that 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 emails. We found 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 its 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 Sydell 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 US Patent Office website. It traces a patent's ownership history.

In the case of Chris Crawford's patent, though, the ownership history was really hard to understand.

Alex Blumberg 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 Sydell 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.

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

Alex Blumberg 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 Sydell So anyway, we went to Peter Detkin to ask our questions, and we started off by showing him that publicly available page on the US Patent Office website. And we asked him what seemed like a pretty straightforward question. When exactly did Intellectual Ventures buy Chris Crawford's patent?

It 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 Blumberg This is just the patent history of Chris's patent. And honestly, we just don't understand this. So if you could explain what we're looking at here. He invented it in 1998.

Peter Detkin I didn't put my reading glasses on, so I'm struggling a little bit here.

Laura Sydell Right, so he invented this--

Pr Woman I don't know that diving into the history of this patent is necessary.

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

Alex Blumberg 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 you actually look at the history, it's a very different story. It seems very different. So I'm trying to figure out if you could explain to us--

Peter 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 in-- you're on the USPTO website? I haven't looked at this particular website in a while. I don't know how it's organized. 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 Blumberg Wait, are you telling me that you run a patent company and you were the head counsel for Intel in the patent department-- you don't know what the patent office website-- you don't know how to read this?

Peter Detkin Look, I mean, I could look at this if you want. 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. So I'm happy to answer questions, but if you're going to cross-examine me about-- on the record about a patent website, I don't think that's quite fair.

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

Pr Woman It's a little different and we're not going to talk about this.

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

Alex Blumberg 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 Sydell Part of it certainly was that we took them 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 Blumberg 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 sort of a private challenge to himself.

Tom Ewing I heard for the longest time when they first started that they had 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 Sydell How many shell companies do you personally believe that Intellectual Ventures has, based on your research?

Tom Ewing Very close to 1,300.

Laura Sydell 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 Blumberg 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 Sydell 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 Blumberg 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 Sydell 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.

Peter 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 Platforce Assets. Please don't ask me what a platforce is. I don't know what it is. And then in August of 2010, we sold it to Oasis Research.

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

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

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

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

Alex Blumberg What does a back-end deal mean, just--

Peter 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 Blumberg 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 Sydell 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?

Peter 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 theirs.

Alex Blumberg You're also still getting paid.

Laura Sydell Yeah, so 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 going to go and bring lawsuits, especially since they're companies that only have these largely run by attorneys.

Peter Detkin Sure, I understand. 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 Blumberg In other words, we try to license these patents in a friendly way, but sometimes you have to sue.

Laura Sydell Peter Detkin then repeated the company line that we'd 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 will actually build what they've invented.

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

Peter Detkin I can tell you that it's happened, but unfortunately the deal's confidential. There are two deals that were done. One was with a toy company and 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? 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'd 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 inven-- they were using it before we bought it, and they are using it after we bought it, but we provided an efficient way for them to get access to those invention rights.

Alex Blumberg 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?

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

Alex Blumberg 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 Sydell 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 hoard is big enough, it can say essentially, if you try to sue me with your patents, I'll sue you with mine.

Alex Blumberg

It's 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 in investor meetings all around Silicon Valley. Chris Sacca was there at one of them.

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

Chris Sacca They pay administrative fees ranging from the tens of thousands 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, malevolent outsiders.

Alex Blumberg In other words, Intellectual Ventures goes around to companies and says, hey, you want to 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 sue you.

Laura Sydell But to Chris Sacca, there's an implication in there. If you don't join us, who knows what will happen? Which reminds him of the business practices of another organization.

Chris Sacca A Mafia-style shakedown, where somebody comes in the front door of your building and says, it'd be a shame if this place burned down. I know the neighborhood really well and I can make sure that doesn't happen. And saying, pay us up.

Now here's what's funny. 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. 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 Blumberg We told Intellectual Ventures that Chris Sacca compared their business to a Mafia shakedown. And in an email, 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 quote, "we're a disruptive company that's providing a way for patent holders to recognize value--" 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 Sydell 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 NPEs.

Alex Blumberg 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 Sydell 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 Blumberg 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.

Laura Sydell 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.

Tom Ewing The troll on steroids.

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

Tom Ewing 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 worth of royalties, so they say. And you have to ask yourself, of the \$2 billion in royalties they've collected, how much of those royalties that they've collected are based on 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 Sydell The problem is to try and figure out what that mix actually 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.

Alex Blumberg 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.

Laura Sydell 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.

Alex Blumberg 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 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.

Tom Ewing So if you calculate this out, that means that over, say, a 10-year period, they are going to need to collect about \$35 billion in licensing revenue. Which 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 Sydell 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.

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 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, five times the opening bid. More than double what most people were expecting. The largest patent auction in history.

Alex Blumberg Think of that. \$4.5 billion on patents that these companies almost certainly don't want for their technical secrets. That \$4.5 billion 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 that adds to the price of every product these companies sell you, \$4.5 billion 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 that no one's ever heard of that could one day take their place.

Ira Glass 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.

[MUSIC - "MODERN INVENTIONS" BY THE SUBMARINES]

Credits.

Ira Glass 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. Production help from Miki Meek. Music help from Damien Graef. Seth Lind is our production manager. Emily Condon's our office manager.

[ACKNOWLEDGEMENTS]

Our website, thisamericanlife.org. *This American Life* is distributed by Public Radio International.

WBEZ management oversight for our show by our boss, Mr. Torey Malatia. I thought he would be so proud of our program this week.

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

Ira Glass I'm Ira Glass, back next with with more stories of this American life.

Announcer PRI, Public Radio International.

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