

INSIDE THE DEAL

THE COLOR OF MONEY

CREATIVE TACTICS RESCUE DIGITAL SCREEN IP TRANSACTION

By Steven Andersen

On the most fundamental level, this is a story about the color green. Organic light-emitting diodes (OLEDs) represent the leading edge of screen technology for everything from pocket-sized phones to giant TVs. They afford tremendous energy efficiency that multiplies battery life, and are so versatile that they can be bent and folded. They are not, however, so great when it comes to the color green.

Unlike other flat screens, OLEDs use organic molecules to break white light into the full spectrum of colors. These emissive layers are arranged to react to an electric current in an extremely precise fashion. But not all colors are easily manipulated. The irony of the most organic of colors is that it leaves behind a kind of visual residue. Over time screens retain a green tint that affects visual consistency and color integrity.

Companies around the world have grappled with this challenge for years, trying to mitigate OLEDs' shortcomings while making the most of the technology's tremendous upsides. Hundreds of patents have been filed and granted. But only one company, a small German startup called Cynora, seemed to have truly cracked the code in a way that could shape the industry for years to come.

The problem was that Cynora was running out of time. The gap between its funding and time to market was increasingly prohibitive. The bet was getting longer, so the business's backers made the decision to sell the company. It was an imperfect outcome — everyone at Cynora would have preferred to bring the technology to market directly — but the choice seemed destined to be nonetheless profitable, as many of the world's top screen manufacturers entered a bidding war.

Samsung came out on top, but then things slowed down dramatically. With Cynora's clock ticking, Samsung let the deal's lockup period nearly lapse.

WAITING GAME

"The expectation, frankly, was that Samsung could get all the benefits of the technology by buying the IP out of bankruptcy for a lot less than they would have paid to buy the company," says Michael Renaud, Chair of the Intellectual Property Division at Mintz. "The deal was about to crater."

Cynora was in need of a rescue. It seemed Samsung had all the leverage, and they were threatening arbitration. For a \$300 billion company with a dominant market position, waiting out a small company with cash constraints looked like a smart play.

It turned out to be a bit more complicated than that. There were a lot of cooks in the kitchen: Two US law firms and two German law firms for Cynora alone, US and German investment groups, and an investment bank that called in Mintz to help save the transaction.

By raising the prospect of arbitration, Samsung had opened the door to a reciprocal claim and to their vast IP portfolio. Samsung sells billions of dollars' worth of phones and displays. A little company called Apple is one of their customers. In an IP counterclaim of any kind for a small company, the asymmetry of revenue would be massive. So, the contest was still David v. Goliath, but David now had a dangerous stone in his sling, and Goliath had a lot to lose.

"It was great that Samsung made an arbitration claim of ownership to Cynora's patents. That's a much bigger risk to them than it is to us," Renaud says. "We recognized the risk to the investors was that they get zero return, they go into bankruptcy and the assets get sold for pennies on the buck. But the truth is, there was mutually assured destruction in some ways."

The investors were persuaded to provide bridge financing to enable a controlled sale of the patents. That bought Cynora valuable time. The company hadn't been sold or gone bankrupt, so it could sell off its patents to the highest bidder.

NOT SO FAST

The additional time also bought leverage.

"We reached the conclusion — and Marguerite was the brains behind this — that we even had an ownership interest in Samsung patents that Cynora had no input on at all," Renaud says. "The way the co-ownership was stated didn't require contribution. The reason that was done was for Samsung itself to make a large claim in the future against Cynora, but since it was reciprocal, it left the door open in both directions."

"Marguerite" is Marguerite McConihe, who was a Mintz associate at the time, and is now a member of the firm. She was brought in to assist on the

deal, but within 10 days became the transaction lead. She was the one who recognized that while the background IP — everything that came before the transaction was initiated — was off limits, everything in the foreground was in play, in both directions.

"We automatically co-owned jointly developed foreground with a carve-out that anything that came exclusively from Cynora remained Cynora's," McConihe says. "But only to the extent that there was significant contribution from Samsung in that joint venture. So, it was a heavy burden for Samsung to prove. Samsung was so active in filing patents in

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MARGUERITE MCCONIHE

Member
Mintz

that area, the default would have been slightly in our favor in terms of ownership assertion by Cynora.”

Renaud uses the analogy of the old Reese’s Peanut Butter Cup ad — *Hey! You got your chocolate in my peanut butter! No, you got your peanut butter in my chocolate!* — to describe the situation. It’s fitting. Point is, they both had a stake in the OLED technology developed since the deal began.

COMING TOGETHER

Cynora asked Samsung to stand down from arbitration, and agreed to do the same, with the understanding that Samsung’s patent estate was now in play. There was an additional twist: Samsung was not able to transfer rights to its manufacturing subsidiary under the terms of the stalled deal. Cynora had performed what in wrestling terms would be called an escape move — getting out of a seemingly pinned position into one of advantage.

Samsung now had future exposure in that its subsidiary could be sued on the patents that Samsung and Cynora co-owned. Cynora could sell its patents to anyone, but they now had specific leverage with Samsung. The solution was not to sell the company to Samsung, but to sell them the patent portfolio. This resolved any ambiguity associated with counterclaims. Simply put, Cynora’s tactics made Samsung the most sensible possible purchaser of the portfolio.

There were problems on both sides of the Atlantic to solve, and a complicated counterparty in Korea. Escrow problems, German transaction and IP issues, and particularly thorny labor and employment considerations. But the negotiation hinged on all the technology that had been developed since the deal dance began. And McConihe was now leading the dance.

“Every interaction with them was an opportunity to stonewall,” McConihe says. “They had a bible of seemingly insurmountable issues, and very little interest in actually proceeding with getting the deal done.”

Meanwhile, a jurisdictional wrinkle that Samsung raised about potential third-party ownership concerns presented the need to bring in a neutral analyst — a German PhD attorney who specialized in the space — to assess the effects of the transaction under German law. That provided a window to sit down with Samsung and start talking through their objections. The process was methodical, and arduous.

“It was German translators and Korean translators and calls that were very convenient for Germany and Korea at the beginning or end of their day, but likely inconvenient for us at three or four o’clock in the morning, trying to listen very carefully to the translators,” McConihe says.



MICHAEL RENAUD

Chair, IP Division
Mintz

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“We were able to set up a call with Samsung where the third-party expert chosen by their German counsel could provide a very brief statement that said, ‘I have reviewed it, I have reviewed it for the issues that you asked me to, and I can provide a statement that says there’s no valid claim of ownership from a third party based on these documents,’” she says.

Ultimately, Samsung was convinced that the third-party ownership claim was not a valid means to hold up the transaction. The sale of the Cynora patents to Samsung was completed, for a sum close to nine figures, in May 2022.

TO THE RESCUE

It took unconventional thinking and a fresh perspective to close a deal that seemed all but dead. Investors had to be persuaded to make a further bet, many legal needles had to be threaded, and a host of interested parties had to gain consensus.

“Deal attorneys are really good at spotting issues, spotting problems, and not necessarily that great at solving them,” McConihe says. “A lot of times the best strategy for the client is pushing outside of their comfort zones and saying *Look at this opportunity, you have this asset that’s not really being used or realized, and there’s so many things you can do with it.*”

In the end, it was a business solution, not a legal victory, that drove a successful outcome for all. The secret to it, Renaud says, is not thinking like a lawyer.

“Marguerite has the most business sense of any transaction lawyer I know,” he says. “I’ll tell you, on a degree of difficulty, this deal was about a 9.9. And I don’t think there’s anyone else who could have pulled off a multinational, thorny, IP/bankruptcy matter like this. She wasn’t even in charge of the deal until she had to be because nobody else could pull it off.”

And as for that OLED tint consideration, McConihe puts it succinctly.

“The fact it has to do with the color green,” she says, “is quite fitting when one is hoping to realize the financial reward for so many years of hard work.”

