China’s Anti-monopoly Law as a weapon against foreigners

By David L Cohen and Douglas Clark

In October 2013 the Guangdong High People’s Court published a curious – at least by Western standards – opinion piece. The article, entitled “A Battle Across the Pacific Ocean”, was ostensibly a review of the Anti-monopoly Law litigation in China between Huawei and InterDigital focusing on the latter’s approach to the licensing of SEPs.

Following comments that Chinese companies had no choice but to pay excessive prices and that many Chinese companies, due to their lack of patents, were forced to work for foreigners, the final section of the piece was entitled “Anti-monopoly Law: A Powerful Weapon to Break Down Technical Barriers”. In this section the author argued that Chinese companies were being held back due to the licensing fees they must pay for patents owned by foreign companies. For “Chinese enterprises to make a revival, there is only one road to take: strengthen our capacity for innovation, and only by gaining control over SEPs can Chinese companies avoid being ‘led by the nose’”.

The author then quoted Chief Judge Qiu Yongqing, who presided over the appeal in Huawei v InterDigital. Qiu regarded Huawei’s use of the Anti-monopoly Law in response to Western patent licensing demands favourably and suggested that “Chinese law firms should bravely employ anti-monopoly lawsuits to break down technology fortresses and win space for development”.

The Chinese perspective on the licensing of SEPs was made very clear by this article. What the article did not address – nor did the Chinese courts – is the very significant problems of some putative Chinese licensees stonewalling negotiations by failing to respond to licensing letters; refusing to meet; changing meeting times at the last minute or dragging out technical discussions for many years or otherwise engaging in behaviour known as ‘holding out’. While some Chinese companies may be working for foreigners, many others are free-riding on foreign technology.

This article reviews how the Anti-monopoly Law has been deployed by Chinese firms to “win space” for technological development by providing a short history of the Anti-monopoly Law and reviewing some of the more well-known litigations under the law. This is followed by a discussion of Vringo’s experiences under the Anti-monopoly Law contrasted with Qualcomm’s experiences to enable a better understanding of what a fully developed plan to win space might mean. Finally, we review what SEP licensors can and should do to mitigate the risk of Anti-monopoly Law actions and provide a practical checklist for how to best prepare and protect interests.

The new Great Wall?
The Anti-monopoly Law first came into force on 1 August 2008. The law had been discussed for a long time but was delayed for multiple years due to the difficulty of reconciling anti-monopoly legislation with an economy where state-owned enterprises – many of which being monopolies – play a large part.

Before coming into force, foreign companies prepared for the law to be enforced quickly. However, in the first few years – aside from merger approvals – the law had little effect on business activities. It is only since 2011 that the Anti-monopoly Law has been vigorously enforced. In 2014 numerous foreign enterprises and some Chinese enterprises were fined significant sums of money for breaching the law. For example, Mercedes Benz and Volkswagen were fined Rmb330 million and Rmb249 million, respectively.

The Chinese courts and three administrative bodies have the power to enforce the Anti-monopoly Law. The main administrative body of concern for SEP owners is the National Development and Reform Commission (NDRC) – formerly the State Planning Commission – which can conduct investigations into excessive pricing. The Ministry of Commerce is responsible for merger control. The State Administration of Industry and Commerce (SAIC) also has power to enforce the Anti-monopoly Law. However, China is in the middle of a large restructuring of its bureaucracy and the SAIC and NDRC anti-monopoly powers are likely to be shifted to the State Administration for Market Regulation.

Three major cases
There were three major cases between 2011 and 2014 involving patents and the Anti-monopoly Law. All related to SEPs in the telecoms industry, including:

- the approval of the Microsoft–Nokia merger;
- two court cases brought by the Chinese telecoms company Huawei against the NPE InterDigital in Guangdong as well as an investigation of InterDigital by the NDRC; and
- an investigation by the NDRC of the US telecoms company Qualcomm.
Microsoft and Nokia
As part of its review of the merger between Microsoft and Nokia, the Ministry of Commerce expressed concern that it could result in a reduction of competition. Both Microsoft and Nokia were required to make numerous commitments regarding their licensing practices (eg, how they brought litigation in relation to their patents) to have the merger approved.

Key commitments made by Microsoft were:
• not to seek injunctions on SEPs anywhere in the world against smartphones made by smartphone manufacturers within the territory of China; and
• to only seek injunctions in relation to non-SEPs after having concluded that a potential licensee was not negotiating in good faith for a licence.

Key commitments made by Nokia were:
• only to seek injunctions against unwilling licencees of SEPs; and
• to agree to submit any dispute over licence terms to be determined by an independent third party.

Huawei v InterDigital
The watershed case for SEP licensing was the case brought by Huawei against InterDigital. The companies were involved in licensing negotiations for SEPs and non-SEPs. Huawei brought two actions against InterDigital in Shenzhen, its hometown. The first action alleged that InterDigital had abused its dominant position in licensing negotiations and sought damages of Rmb20 million based on the expenses Huawei incurred in defending itself against actions brought by InterDigital outside China. The second action asked for a FRAND royalty rate to be set based on provisions of the General Principle of Civil Law and Contract Law which require parties to act in good faith.

The Shenzhen Intermediate People’s Court and subsequently the Guangdong Higher People’s Court (Huawei Technology Co Ltd v InterDigital Technology Corporation, Guangdong Higher People’s Court, Minsanzhongzi 305 and 306 of 2013) found that each SEP was itself a market and that InterDigital therefore held a dominant position in that market. The courts further held that the licensing of patents to Huawei outside China had an effect on the Chinese market and was therefore covered by the Anti-monopoly Law. The courts held that InterDigital had abused its dominant position by:
• seeking excessive royalties;
• using discriminatory pricing;
• seeking to tie licensing of SEPs and non-SEPs together;
• seeking a grant back of Huawei’s rights; and
• commencing actions in the United States while negotiations were in progress.

Under the Anti-monopoly Law the court ordered InterDigital to pay Rmb20 million (approximately $3 million) in damages based on the costs Huawei incurred in defending actions overseas. In Huawei’s FRAND claim, the court found that InterDigital had not been acting in accordance with FRAND principles when negotiating with Huawei. The court held that that FRAND rates should be determined based on:
• the general profit level of the industry;
Meeting the NDRC – a senior NPE executive goes to Beijing

When David Cohen – the co-author of this article and former chief legal and IP officer of Vringo – visited the NDRC in April 2015 in connection with a complaint filed by ZTE – which Vringo was suing in the United States and other jurisdictions – it quickly became apparent that one of the NDRC’s goals was to pressure Vringo into leaving ZTE alone.

For example, during that initial meeting the NDRC threatened to demand Mr Cohen’s presence in Beijing every other week. For those that have not had the pleasure of meeting with NDRC investigators, these were not simple meet-and-greet visits.

At the first meeting, Mr Cohen was yelled at by NDRC staff and told he was worse than Qualcomm and InterDigital combined – both regarding his violations of the Chinese Anti-monopoly Law and for the insolence he personally showed to the Chinese state. This insolence included seeking and enforcing injunctions against ZTE and for not being sufficiently deferential toward his interrogators, including not sitting in his chair properly.

During the meeting the chief interrogator made more than eight references to the fact that the heavily armed military police walking around the building had “nothing to do with the NDRC” and that Mr Cohen should not be worried, like Bill Merritt of InterDigital, about the armed military guards. This was little comfort to Mr Cohen who genuinely feared for his personal safety.

In June 2015 the NDRC demanded that Mr Cohen travel to Beijing for a second time to answer further inquiries. What seems to have specifically motivated the NDRC to demand his presence was the substantial document discovery of ZTE in the Southern District of New York case. What really seemed to drive his interrogators to apoplexy was that ZTE produced its communications with the NDRC.

Those documents included materials that appeared to suggest that ZTE was, in fact, drafting all of the NDRC’s communications with Vringo. Subsequently Vringo learned that the topic of document discovery in the Southern District of New York litigation was sufficiently concerning to the NDRC that it was referenced (albeit obliquely) during meetings of IP delegations when President Xi Jinping visited the United States in Autumn 2015.

This second session, which was unofficial, closed with a strong suggestion that Vringo accept the NDRC’s mediation of its dispute with ZTE or the NDRC would seek criminal penalties against Vringo. These penalties included:

- repossessing all of the company’s intellectual property in China and reselling it for a nominal fee to third parties;
- filing criminal charges against Mr Cohen and other Vringo employees; and
- seeking extradition so that Mr Cohen would “never be able to leave the United States, ever”.

Two things are remarkable about the Vringo experience with the NDRC. First, that the NDRC bothered at all, given that Vringo’s portfolio was small compared to other known licensing company targets of the NDRC such as InterDigital and Dolby Laboratories. Vringo only claimed to have 28 SEP families and fewer than 145 patent families in total – even including those irrelevant to ZTE.

Moreover, the portfolio was focused on telecoms infrastructure where there are many fewer Chinese potential licensees than with handset-focused patents. However, Huawei’s licence with Nokia, the only other large Chinese infrastructure manufacturer, had expired by this point, so it would have been reasonable for the NDRC to assume that Huawei too would need to negotiate a licence with Vringo. In addition, by 2015 when the NDRC commenced its investigation, Vringo’s market capitalisation and cash reserves had plummeted significantly from its 2013 highs. Finally, Vringo had not sued any other Chinese entities.

The second remarkable aspect is the extent of the NDRC’s involvement in ZTE’s dispute: both through its direct pressure on Vringo and through – as reflected in the Southern District of New York proceedings – the depth of the strategic and tactical advice it gave ZTE on how to fight back.

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Vringo in China

Into the fray entered Vringo. Vringo was an NPE that had acquired a portfolio of patents (SEPs and others) from Nokia and a few other sources. One interpretation of the Vringo deal was that, frustrated by years of fruitless negotiation with ZTE, it became part of Nokia’s attempt to monetise its portfolio. Nokia sold a portion of its patent portfolio to the NPE for a lump sum. Vringo would then license these patents to ZTE and Nokia would share any resulting royalty revenues.

The dispute was global in scope and involved many components. It generated a large amount of press coverage, both in IAM and among market observers. This is partly because Vringo’s litigation strategy went from success to success. When Vringo’s UK Patent 1212919 was challenged by ZTE but upheld as valid and infringed, this marked the first time that a cellular infrastructure SEP had succeeded in the United Kingdom and the industry keenly looked on. One follower with the pseudonym VRNG24 collected nearly every publicly available document pertaining to Vringo and its litigations on his website (for a summary of the dispute see “A Short History of Vringo’s Battle with ZTE”, by Vringo’s former chief legal and IP officer, David L Cohen). The key highlights of the case concerning the Anti-monopoly Law were as follows:

- Vringo sought and secured injunctions (both preliminary and final) and customs detentions against ZTE around the world – especially in jurisdictions with strict ‘loser pays’ regimes (eg, the United Kingdom and the Netherlands).
- After securing injunctions in India (later converted to interim arrangements) in December 2013, Vringo and ZTE entered into a non-disclosure agreement (NDA) and held settlement discussions where Vringo presented ZTE with a settlement proposal.
- As Vringo would find out more than six months later, ZTE breached the NDA to both file an anti-monopoly case in Shenzhen and seek and obtain an NDRC investigation against Vringo.
- ZTE also sought – through multiple requests on the same patent – to revoke Vringo’s Chinese patents before the SIPO.
- In response to ZTE’s breach of the NDA, Vringo sought and received a temporary restraining order and later a preliminary injunction and summary judgment.
in the US Federal Court in the Southern District of New York.

As part of the federal court action, Vringo was able to receive a tremendous amount of discovery both of ZTE's internal deliberations about what to do about Vringo and ZTE's communications with the NDRC about Vringo.

As an aside, but one highly relevant to those involved in litigation with Chinese entities, one possible reason that Vringo was able to obtain so much discovery in the federal court action is that the judge held that Chinese counsel – both in-house and private practice – do not generate attorney-client privilege. Another possible reason for the discovery may be rooted in the judge's negative reaction to ZTE's assertion of Chinese state secret law over almost all of Vringo's discovery requests. ZTE's position appeared to be that any of ZTE's internal deliberations about patent licensing in general and about Vringo in particular were a state secret. Regardless of the reason, ZTE was ultimately ordered to produce significant document discovery.

The discovery produced by ZTE revealed that it undertook an intense, year-long lobbying campaign to get the NDRC to investigate Vringo. In late 2014 the NDRC finally acted against Vringo, sending a letter summoning its senior representatives to Beijing.

In parallel to the NDRC investigation, Vringo received additional document discovery in the US Federal Court in the Southern District of New York litigation. To say that the documents received were somewhat disturbing is an understatement. The documents showed that the NDRC and ZTE seemed interested in creating an anti-Vringo media campaign in China and globally. The NDRC recommended that ZTE exert pressure on Vringo’s share price – and depending on how the record is interpreted, potentially engage in naked short selling of Vringo stock.

As a small public company, Vringo's public filings with the US Securities and Exchange Commission enabled those with a good understanding of how IP licensing works great insight into its finances. Indeed, the NDRC and ZTE seemed very much aware of Vringo's burn rate and that ZTE could easily outlast Vringo’s ability to pay its bills. It was thus easy to conclude from reading the documents that ZTE and the NDRC were working hand-in-glove at a level that seems to put the lie to any semblance of procedural fairness. There were even documents that seemed to hint that Google and ZTE were collaborating behind the scenes on ZTE’s various competition law claims against Vringo in China and Europe.

Ultimately Vringo and ZTE settled in December 2015. By then ZTE was facing Romanian and Brazilian injunctions along with what ZTE alleged to be a multimillion-euro liability to its carrier customers for non-performance. In addition, ZTE was subject to a sanctions motion seeking a default judgment for failing to produce its general counsel for deposition in New York despite multiple orders to do so.

ZTE refused to produce its general counsel because he was concerned about an open arrest warrant for fleeing a grand jury subpoena investigating ZTE’s involvement with sales of telecoms equipment to Iran in violation of US sanctions. When informed of the settlement, the NDRC brusquely informed Vringo’s counsel that “the investigation remains open”.

To further tease out possible motivations behind the NDRC's actions more generally, we now need to review Qualcomm's experiences. While Qualcomm’s NDRC investigation commenced with a level of hostility, it seems to have concluded with the company in a somewhat enhanced position.
The Qualcomm experience

In 2013 Qualcomm was subject to what appeared to outsiders as a bruising investigation by the NDRC into how the company’s patent – especially its SEP – licensing practices violated the Anti-monopoly Law. What is particularly instructive about Qualcomm’s experiences in China is that the antitrust arguments it faced did not appear to be materially different from those it faced before South Korean or Taiwanese competition law authorities – or for that matter the US Federal Trade Commission. Moreover, in South Korea, Qualcomm also claimed to have run into government agents trying to use competition laws to aid domestic champions (ie, claiming that the Korea Fair Trade Commission investigation was tainted by the relevant investigators’ ties to Samsung). The primary difference seems to be that China’s authorities – unlike those elsewhere – having used competition law issues as a weapon, were quite eager and ready to enter into a win-win deal.

Qualcomm was able to negotiate a favourable outcome for itself. While only Qualcomm knows whether these activities were part of a quid pro quo related to SEP licensing practices, around the time of the NDRC investigation Qualcomm began investing heavily in developing technology in China. Some of its investments included:

- partnering with a local university to create an ‘Internet of Things-connected smart-car collaborative innovation laboratory’;
- creating an artificial intelligence lab; and
- partnering with the Guizhou government to develop high-end server chips in China.

In any event, as part of its 2015 settlement with the NDRC, Qualcomm received permission to apply its usual royalty rates of 5% for multimode and 3.5% for LTE devices to 65% of the net sales price of handsets to Chinese licensees. This was a major victory when regulators and customers the world over (especially Apple) argued that these rates were far too high. The imprimatur of NDRC is a significant victory for Qualcomm’s handset licensing programme in China. Few Chinese manufacturers would be inclined to hold-out on a licence to Qualcomm.

In exchange, in addition to an admittedly hefty fine of approximately $975 million, Qualcomm forfeited its right to demand pass-through rights from its Chinese customers – that is, Qualcomm received a licence for its customers’ patents that it could pass through to its other customers. This is an important concession. Indeed, some have claimed that the rumoured four-times difference in the lump sums that Nokia and Ericsson recently received from Apple as part of their recent, and near-contemporaneous, SEP licences and settlements is that Nokia’s portfolio is not subject, while Ericsson’s is subject, to the Qualcomm pass-through rights. While such a conclusion is debatable, what is clear to most Qualcomm watchers is that the pass-through right is a significant value driver for Qualcomm.

What is curious about the pass-through right concession is that it only really benefits Qualcomm customers who might be net SEP licensors. No companies in China at the time of the Qualcomm settlement even came close to having a robust licensing programme. Therefore, one way to look at this concession is as an attempt by the Chinese state to benefit those companies with significant SEP portfolios and to encourage other Chinese Qualcomm customers to develop or acquire large SEP portfolios for net licensing purposes.

Indeed, recent studies have focused on claims of how ZTE and Huawei’s SEP portfolio has become by far the most extensive for 4G and 5G after Qualcomm. In the telecoms realm in China it is only these two companies that have substantial, homegrown – and therefore unencumbered – portfolios. It is also worth noting that Xiaomi, Coolpad and TCL have been busy filing patents and acquiring large patent portfolios from third parties.

Huawei is without doubt the most sophisticated Chinese player in this space. It seems to be following Western SEP net licensors’ playbooks (eg, Nokia and Ericsson) by creating privateers; suing and seeking injunctions at home against major competitors; utilising patent-friendly foreign jurisdictions to directly monetise patents (as witnessed by Huawei’s suit against T-Mobile in the Eastern District of Texas); and seeding multiple NPEs by divesting many small lots of 10 to 40 patents.

In another coincidence of timing, around the same time of Qualcomm’s settlement, Chinese courts began to be much more receptive to traditional patent monetisation techniques. As a result, both foreign and Chinese NPEs are eagerly exploring monetisation in China to reasonable degrees of success. This has led major players, like patent monetiser Dominion Harbor – through its tie up with the leading

The development of anti-monopoly legislation in China

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<th>Date</th>
<th>Event</th>
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<tr>
<td>August 2008</td>
<td>China’s Anti-monopoly Law enters into force</td>
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<td>December 2011</td>
<td>Huawei files antitrust and FRAND lawsuits against InterDigital in Shenzhen</td>
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<td>February 2013</td>
<td>Shenzhen Intermediate People’s Court rules that InterDigital abused its dominant market position by tying SEP licences to non-SEP licences</td>
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<td>October 2013</td>
<td>Guangdong Higher People’s Court upholds Shenzhen court’s anti-monopoly ruling against InterDigital</td>
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<td>November 2013</td>
<td>National Development and Reform Commission (NDRC) begins investigating Qualcomm’s licensing practices</td>
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<td>April 2014</td>
<td>China’s Ministry of Commerce approves Microsoft’s approval of the Nokia devices and service business, imposing restrictions on both firms’ patent licensing activities in the process</td>
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<td>Late 2014</td>
<td>NDRC begins investigating Vringo</td>
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<tr>
<td>February 2015</td>
<td>Qualcomm settles with the NDRC, paying a $975 million fine and changing certain licensing practices</td>
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<td>December 2015</td>
<td>Vringo and ZTE settle global patent dispute</td>
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<td>September 2016</td>
<td>InterDigital and Huawei sign a multi-year patent licence</td>
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<td>April 2017</td>
<td>Beijing IP Court issues country’s first SEP injunction in Iwncomm v Sony</td>
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Chinese law firm Beijing East IP – to venture into the Chinese market. Moreover, the recent announcement by iPEL of a $100 million fund to monetise patents in China shows how much perceptions have changed. Some of this is no doubt related to the recent Beijing court
Canon v Sony decision to award an injunction on an SEP as well as damages of Rmb9 million ($1.5 million).

It is fair to wonder why ZTE has failed to gain as much traction as Huawei despite having more assistance from the Chinese state. We believe that, while it took a while for the NDRC to realise this (and Vringo had to suffer as a result), a simple but powerful reason why ZTE has failed to be as successful as Huawei is that ZTE is a uniquely bad actor, as has been shown by recent events, and considers itself above the law. ZTE’s behaviour was such that even its most stalwart Chinese defenders are acutely aware – if somewhat embarrassed – of that fact.

What are Western rights holders to do?
Given the legal and political complexities of dealing with intellectual property in China, what can and should SEP holders do to mitigate the risk of Anti-monopoly Law actions in China?

Know your counterparty
While knowing who you are dealing with and what their licensing and litigation approaches are is always a good strategy, with Chinese entities it is especially important. In the past getting useful information without an honest and trustworthy informant was challenging, but today a number of databases and service providers can provide much of this information. That said, it is important to be careful of over-eager peddlers of secrets offering mono-causal explanations of what are typically complex situations or promising high-level access to real decision makers. Some key datapoints about investigating a counterparty include:

• If the counterparty is not one already, are any of the counterparties major suppliers, customers, shareholders or founders of well-connected Chinese firms or individuals?
• Is the technology at issue in the dispute subject to a government plan such as Made in China 2025?
• What does the counterparty’s IP portfolio look like? Can any areas of technical interest to the counterparty be discerned? Are any of these patents SEPs?
• Has the counterparty been filing or acquiring patents at an increased or increasing rate? In what areas?
• Has the counterparty filed suit on its patents? Have they been sued? Who are their law firms? Can their litigation approach be discerned?
• Has the counterparty filed a reexamination request at the SIPO? If so, were the subject patents owned by third parties who sued the counterparty in China or elsewhere? If so, what percentage of the third party’s portfolio did the counterparty seek to reexamine? Did the counterparty file multiple reexamination requests on the same patent?
• Do they have any known SEPs? Have they participated in standards bodies? How?
• What is their attitude toward confidential information? Have they been involved in any disputes over trade secrets? In which jurisdictions?
• Are they willing to enter into an NDA? If so, do they have US or other foreign assets? If yes, will they be willing to be subject to a choice of forum law in your preferred forum?

Action plan
Dealing with an anti-monopoly investigation in China is one of the most sensitive and business-critical challenges a patent owner can face. Having a strategy in place to deal with these issues is essential.

• Remember that China’s Anti-monopoly Law is relatively young at 10 years old.
• Enforcement only started ramping up in 2011, so many questions remain unanswered.
• The Microsoft-Nokia deal was the first time a Chinese regulator placed restrictions on SEP licensing – among other things, the Ministry of Commerce forbade Microsoft from seeking SEP injunctions against smartphones made in China anywhere in the world.
• The NDRC investigation of Vringo evidenced close collaboration between regulators and Chinese national champion ZTE, a factor which foreign firms should account for.
• On the other hand, the NDRC investigation of Qualcomm showed that regulators are willing to cut a win-win deal with a foreign licensor.
• Recently, Chinese authorities and courts have become more receptive to traditional patent monetisation techniques – many of which have been adopted by leading Chinese technology companies.

“While knowing who you are dealing with and what their licensing and litigation approaches are is always a good strategy, with Chinese entities it is especially important.”

Technical discussions
Be prepared for detailed technical discussions. The best defence to an allegation that a party has not been negotiating in good faith is the presentation of detailed technical discussions. The following should be considered:

• Do not assume your counterparty will not engage in technical discussions seriously. While some putative Chinese licensees only go through the motions of technical discussions, others do engage in depth.
• Prepare and present detailed infringement claim charts and have appropriately qualified technical professionals attend meetings.
• Be prepared to deal with challenges to the validity of your patents, including analysing in advance the most relevant prior art. If there have been any challenges anywhere in the world to the family of patents, your counterparty will be aware of them and raise the prior art cited.

Security and trust
While physical and information security and the presence of trustworthy counsellors should always be a priority, in China it is important to give this question added scrutiny and consider the following:

• For each local Chinese professional (eg, lawyers, technical and legal advisers, experts, handlers and translators), how
confident are you that they will be zealous advocates for your cause? Are there steps you can take to minimise your risk if any one of them is less than trustworthy?

- Have you considered the probabilities regarding whether attorney-client privilege will attach to your communications with Chinese local advisers? Have you considered utilising a near-local common lawyer (e.g., counsel in Hong Kong) to supervise Chinese counsel and manage communications?
- Have you considered your physical and cybersecurity? Have you taken out insurance for high-risk situations? US embassy officials advise that all electronic devices brought into China could be subject to hacking and US citizens should plan accordingly. They also recommend that all US visitors who have dealings with Chinese state regulators (e.g., the NDRC) visit the US embassy and ostentatiously let the regulators whom they are visiting know of their plans.

FRAND
While minimising competition law challenges in SEP assertions is challenging anywhere, given the number of highly public positions taken by Chinese authorities, it is even more important to carefully consider your approach, including the following:

- If you are considering litigation, have you identified patents that can be asserted given China’s strict evidential requirements?
- Are you prepared to handle multiple invalidation requests before the SIPO?
- If you are seeking injunctive relief, did you make at least one licence offer on FRAND terms?
- Did you offer to arbitrate the terms of a FRAND licence with the infringer and allow time for a response to such an offer? Did you design the offer so that Chinese regulators would consider it to be fair?
- Can you clearly articulate why your licence offers are FRAND to show that they have been negotiated in good faith?

Prudence advised
At the end of the day there are many good reasons to consider SEP assertions in China, but following the experiences of InterDigital, Vringo and Qualcomm, prudence and planning are strongly recommended. Most importantly, each stage of negotiations and deadlines that are imposed for responses must be documented in writing to mitigate the risks of facing an Anti-monopoly Law suit. The key is to demonstrate that negotiations have been made according to FRAND rules and that you are a willing licensor, whereas your counterparty is an unwilling licensee.

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