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## DESTINED TO COLLIDE? SOCIAL MEDIA CONTRACTS IN THE U.S. AND CHINA\*

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## 1. INTRODUCTION

Social networking websites have evolved in the United States, largely during the past fifteen years, as interactive platforms that enable hundreds of millions of members to create, manage, and share their interests online.<sup>1</sup> The growth rate of the global social media industry is truly spectacular, with many American sites becoming household names. LinkedIn, founded in 2003, has evolved into a multi-purpose site, centered on building employment networks among professionals.<sup>2</sup> Facebook, launched in 2004, claims 1.55 billion monthly active users.<sup>3</sup> Twitter, created in 2006, is a real-time communications platform that enables users to interact with short messages up to 140 characters in length. Twitter boasts 320 million active users monthly who send 500 million Tweets per day.<sup>4</sup>

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<sup>1</sup> A social networking service is an online service, platform, or site that focuses on building and reflecting social networks or social relations among people, e.g., who share interests and/or activities. A social network service essentially consists of a presentation of each user (often a profile), his/her social links, and a variety of additional services. Most social network services are web-based and provide means for users to interact over the Internet, such as e-mail and instant messaging. Online community services are sometimes considered to be a social network service, though in a broader sense, social network service usually means an individual-centered service whereas online community services are group-centered. Social networking sites allow users to share ideas, activities, events, and interests within their individual networks. "Online community services are sometimes classified as a social network service, though in a broader sense, social media usually means an individual-centered service whereas online community services are group-centered. Social networking sites allow users to share ideas, activities, events, and interests within their individual networks." *Social Networking Services*, SCRIBD, <http://www.scribd.com/doc/53943621/Social-Networking-Service> (last visited Feb. 12, 2015).

<sup>2</sup> See LinkedIn (Feb. 3, 2015), <https://www.linkedin.com/company/linkedin> ("Founded in 2003, LinkedIn connects the world's professionals to make them more productive and successful. With more than 300 million members worldwide, including executives from every Fortune 500 Company, LinkedIn is the world's largest professional network on the Internet. The company has a diversified business model with revenue coming from Talent Solutions, Marketing Solutions and Premium Subscriptions products. Headquartered in Silicon Valley, LinkedIn has offices across the globe.[www.linkedin.com](http://www.linkedin.com).").

<sup>3</sup> See FACEBOOK NEWSROOM, *Our Mission*, FACEBOOK, <http://newsroom.fb.com/company-info/http://newsroom.fb.com/Company-Info/> (last visited Dec. 5, 2015) (explaining that Facebook has, "1.55 billion monthly active users as of September 30, 2015").

<sup>4</sup> See Twitter Usage, *Company Facts*, TWITTER, <https://about.twitter.com/company> (last visited Dec. 5, 2015) (noting 320 million monthly active users).

The popular assumption is that the United States is number one in social networks. While social media was born in the United States, China is now the world's largest social network marketplace by a wide margin.<sup>5</sup> As of January 2015, China's 629 million active social media users comprised more than thirty percent of the estimated 2.08 billion global users.<sup>6</sup> Seven of the world's sixteen largest social networks in the world are headquartered in the People's Republic of China ("PRC").<sup>7</sup> Renren, China's equivalent of Facebook, had a sign in the employee lounge of at its operational headquarters that bragged, "Every day the number of people joining Renren.com would fill 230 Tiananmen Squares."<sup>8</sup>

China's users spend nearly three hours a day on social media, outpacing other developing countries.<sup>9</sup> China's social media platforms differ in important ways from their American equivalents, re-

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<sup>5</sup> See *Facts and Statistics about Social Media in China*, STATISTA, <http://www.statista.com/topics/1170/social-networks-in-china/> (last visited Feb. 24, 2015) ("China is the world's largest social network market.").

<sup>6</sup> See Steven Millward, *The Latest Numbers on Web, Mobile, and Social Media in China in Early 2015 (Infographic)*, TECH IN ASIA, (Jan. 21, 2015), <http://www.techinasia.com/china-web-mobile-data-start-2015/> (last visited Feb. 4, 2015) ("China's web users have 629 million active social media accounts (from a global tally of 2.08 billion).").

<sup>7</sup> See Cooper Smith, *The World's Twenty-Four Largest Websites and Where Their Next Wave of Growth Will Come From*, BUSINESS INSIDER, (Nov. 29, 2013), <http://www.businessinsider.com/a-global-social-media-census-2013-10> (last visited Feb. 10, 2015) (depicting the sixteen largest social networks in the world by way of a monthly active users infographic).

<sup>8</sup> CONG. RESEARCH SERV., *China's Economic Rise: History, Trends, Challenges, and Implications for the United States*, (Oct. 9, 2014), <https://www.hsdl.org/?view&did=758650> (last visited Feb. 7, 2015).

<sup>9</sup> See, e.g., Thomas Crampton, *Social Media in China: The Same, but Different*, CHINA BUS. REVIEW (Jan. 1, 2011), <http://www.chinabusinessreview.com/social-media-in-china-the-same-but-different/> (explaining that, "Different social media usage patterns tell a great deal about the Internet and the country involved. For example, Chinese netizens use online video platforms quite differently, from how Americans use YouTube. Rather than short videos of cute animals or silly domestic mishaps that may be popular among YouTube watchers, Youku and Tudou are filled with longer form content, up to 70 percent of which is professionally produced. Users in China spend up to an hour per day on the sites, compared with less than 15 minutes spent by Americans on YouTube. In the way they present programs, the Chinese sites seem more like online television stations or a replacement for digital video recorders. Though individuals in China produce and post videos, a large portion of online video content is longer-format professional videos. Much of this content consists of foreign programs pirated, subtitled, and uploaded hours after broadcast in the United States.").

flecting “local variations of Internet usage [that] are driven by language, culture, levels of economic development, and the underlying digital ecosystem.”<sup>10</sup> Chinese young adults report having more friends online than offline because of unique demographic factors such as the, “rural-to-urban migration that has separated families, the loneliness of the one-child generation, and a distrust of information from government-controlled media. . . . In China, more than in many countries, social media has become deeply integrated into people’s lives.”<sup>11</sup> As China enters 2015, as perhaps the largest economy in the world,<sup>12</sup> it is a propitious moment to conduct the first audit of the largest Chinese social media providers’ contracting practices.<sup>13</sup> Increasingly, legal disputes will occur as American social media sites and services cross China’s virtual borders, and Chinese providers enter the consumer market in the United States. As an illustration, the United States Federal Trade Commission (“FTC”) recently warned the Chinese early childhood application developer, Babybus, that it was possibly in violation of the FTC’s regulation governing the Children Online Privacy Protection Act (“COPPA”)<sup>14</sup> because it collected “precise geolocation information that is transmitted to third parties, including advertising networks and/or analytics companies” without parental consent.<sup>15</sup> Similarly, an American social media provider that disclaims warranties, asserts caps on

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., Joseph E. Stiglitz, *The Chinese Century*, VANITY FAIR 38, Jan. 2015, <http://www.vanityfair.com/news/2015/01/china-worlds-largest-economy> (“When the history of 2014 is written it will take note of a large fact that has received little attention: 2014 was the last year in which the United States could claim to be the world’s largest economic power.”).

<sup>13</sup> See Wayne M. Morrison, *China’s Economic Rise: History, Trends, Challenges, and Implications for the United States*, CONG. RESEARCH SERV. (Oct. 9, 2014), <http://www.fas.org/sgp/crs/row/RL33534.pdf> (last visited Feb. 14, 2015) (explaining that “[p]rior to the initiation of economic reforms and trade liberalization 36 years ago, China maintained policies that kept the economy very poor, stagnant, centrally-controlled, vastly inefficient, and relatively isolated from the global economy. Since opening up to foreign trade and investment and implementing free market reforms in 1979, China has been among the world’s fastest-growing economies, with real annual gross domestic product (GDP) growth averaging nearly 10% through 2014. In recent years, China has emerged as a major global economic power. It is now the world’s largest economy (on a purchasing power parity basis), manufacturer, merchandise trader, and holder of foreign exchange reserves.”).

<sup>14</sup> See Children’s Online Privacy Protection Rule, 16 CFR § 312 (2005) (stating regulation as to how businesses can comply with COPPA).

<sup>15</sup> Katie W. Johnson, *FTC Warns Developer Its Apps May Violate Children’s Online*

damages, shortens statutes of limitations, or imposes other unsymmetrical provisions favoring providers that are ubiquitous in American consumer contracts, are prohibited by the PRC Law on the Protection of Consumer Rights and Interests, which went into effect on March 15, 2014.<sup>16</sup> Article 10 of the amended Chinese consumer law gives consumers the right to “fair transactions,” which would prohibit the buried or inconspicuous terms in standard-form contracts<sup>17</sup> that are common in U.S. social media agreements.<sup>18</sup>

The Chinese legal system’s policing of standard form contracts such as online terms of use is not a recent development. Both the recent Chinese contract law revision and the former consumer law statute disfavor one-sided standard form contracts. An American

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*Privacy Act*, BLOOMBERG BNA: ELECTRONIC COMMERCE & LAW REPORT (Dec. 22, 2014) (explaining, “BabyBus, which makes its apps available on the Apple iTunes Store, Google Play, and Amazon Appstore for Android, markets over 60 free mobile apps to children between the ages of one and six, according to the FTC staff’s letter. The apps use cartoon characters to teach children about letters, numbers, shapes, music, and matching. Its apps have been downloaded millions of times, the letter said. “Several of your apps appear to collect precise geolocation information that is transmitted to third parties, including advertising networks and/or analytics companies,” the FTC staff said.”).

<sup>16</sup> See CECC.gov, Congressional-Executive Commission on China (Jan. 14, 2014), <http://www.cecc.gov/publications/commission-analysis/amendments-to-consumer-protection-law-allows-for-public-interest> (last visited Feb. 28, 2015); see also, People’s Republic of China Law on Protection of the Rights and Interests of Consumers, <http://chinalawtranslate.com/en/consumer-protection-law-including-2013-amendments/> (“The Decision on Amending the PRC Law on the Protection of Consumer Rights and Interests was adopted at the 5th Session of the Standing Committee of the Twelfth National People’s Congress on October 25, 2013, and is hereby released to take effect on March 15, 2014.”).

<sup>17</sup> People’s Republic of China Law on Protection of the Rights and Interests of Consumers, at art. 10 (“Consumers enjoy the right to fair transactions”); see also, Ron Cai and Victoria Ding, *Amendments to the Law on the Protection of the Rights and Interests of Consumers to Take Effect on March 15, 2014*, DAVIS, WRIGHT & TREMAINE ADVISORY, <http://www.dwt.com/Amendments-to-the-Law-on-the-Protection-of-the-Rights-and-Interests-of-Consumers-to-Take-Effect-on-March-15-2014-01-07-2014/> (last visited Feb. 10, 2015) (“Terms in a standard-form agreement that materially affect a consumer will be effective only if they are conspicuous and draw the consumers’ attention to the information about goods or services that has a material impact on the consumers”).

<sup>18</sup> Michael L. Rustad & Thomas H. Koenig, *Wolves of the Worldwide Web: Reforming Social Networks’ Contracting Practices*, 49 WAKE FOREST L. REV. 1431 (2015) (surveying 329 social media terms of use including 188 U.S.-based providers and finding key provisions to be inconspicuous; For example, “[s]ocial media providers situate arbitration clauses deep within the interior of the TOU. On average, a consumer would have to read more than ten single spaced pages (4,615 words) before reaching the first word of the arbitration clause.”).

company that includes inconspicuous or anti-consumer terms of use for the Chinese marketplace risks individual court actions in Chinese provincial courts or “government-led class action against . . . business operators.”<sup>19</sup>

China’s social media platforms evolved in relative isolation from their American equivalents because the government of China forbids its population from accessing most major American social media sites. In 2009, China blocked Facebook and Twitter in response to riots in Xinjiang.<sup>20</sup> The “Great Firewall of China” continues to block Facebook,<sup>21</sup> but, despite this ban, the social media giant is

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<sup>19</sup> In December 2013, the PRC enacted new consumer laws that created “[a] more active consumer protection association. For the first time, the consumer protection associations (at the provincial levels) are granted the right to bring lawsuits when rights of a large number of consumers are violated. This type of lawsuit could essentially be a government-led class action against private parties, such as business operators. The procedure of such lawsuits is yet to be clarified and tested. Further, for the first time the consumer protection association is officially invited to participate in the drafting of consumer protection-related laws and regulations.” See Amy L. Sommers & Max Gu, *China’s New Consumer Protection Law: Dramatic Changes Ahead*, K&L GATES (Dec. 20, 2013), <http://www.klgates.com/chinas-new-consumer-protection-law-dramatic-changes-ahead-12-20-2013/> (last visited Feb. 12, 2015) (“On October 25, 2013, China’s President and Chairman of the Communist Party of China Xi Jinping signed off on the long-expected revised Law on the Protection of Consumer Rights and Interests (the “New Consumer Law”), which is believed to be the first major national overhaul on the consumer protection legislations in two decades. The New Consumer Law will become effective on China’s Consumer Protection Day of 2014, i.e., March 15, 2014, on which day the 20-year old current Law on the Protection of Consumer Rights and Interests (the “Previous Consumer Law”) will cease to be effective.”); see also, Ron Cai and Victoria Ding, *Amendments to the Law on the Protection of the Rights and Interests of Consumers to Take Effect on March 15, 2014*, DAVIS, WRIGHT & TREMAINE ADVISORY, <http://www.dwt.com/Amendments-to-the-Law-on-the-Protection-of-the-Rights-and-Interests-of-Consumers-to-Take-Effect-on-March-15-2014-01-07-2014/> (last visited Feb. 10, 2015) (“The China Consumer Association and the Consumer Associations at the provincial level may bring lawsuits to the People’s Courts against activities detrimental to numerous consumers’ legitimate rights and interests (Article 20 of the Amendments”).

<sup>20</sup> Dana Liebelson, *MAP: Here Are Countries That Block Facebook, Twitter, and YouTube*, Mother Jones (March 28, 2014), <http://www.motherjones.com/politics/2014/03/turkey-facebook-youtube-twitter-blocked> (last visited Nov. 10, 2014) (“China blocked Facebook, Twitter, and YouTube in 2009. The Twitter and Facebook bans took place after a peaceful protest by Uighurs, China’s Muslim ethnic minority, broke into deadly riots in Xinjiang.”); See also, Thomas Crampton, *Social Media in China: The Same but the Different*, CHINA BUSINESS REVIEW <http://www.chinabusinessreview.com/social-media-in-china-the-same-but-different/> (last visited Feb. 16, 2015).

<sup>21</sup> Kristina Zucchi, *Why Facebook is Banned in China*, INVESTOPEDIA (Apr. 29, 2015), <http://www.investopedia.com/articles/investing/042915/why-facebook>

slowly expanding its advertising business in that country.<sup>22</sup> Chinese nationals have found creative ways to access Facebook, Twitter, and other blocked social media sites using Virtual Private Networks, proxies or Tor.<sup>23</sup> Facebook is expected to launch a dedicated Chinese social media website that conforms to the laws of the PRC in the near future.<sup>24</sup>

Contrary to Western assumptions, it is threats to the social order, not criticism of the government officials, which generally leads to censorship:

[I]f you write a social media post in China that criticizes the government, it is no more likely to be censored than if you write one supporting the government. What we discovered in stead is that they censor any effort at collective action – any attempt to move people, controlled by someone outside of government.<sup>25</sup>

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banned-china.asp (last visited Nov. 10, 2015).

<sup>22</sup> Alyssa Abkowitz, *Facebook Woos Chinese Advertisers: Social-Media Firm Wages Campaign to Draw More Business from Chinese Companies*, WALL ST. J. (Mar. 29, 2015), <http://www.wsj.com/articles/facebook-woos-chinese-advertisers-1427659098> (last visited Nov. 10, 2015).

<sup>23</sup> See, e.g., *How to Do Anything, How to Successfully Access Facebook in China*, WIKIHOW, <http://www.wikihow.com/Successfully-Access-Facebook-in-China> (last visited Feb. 5, 2015) (providing a guide on how to circumvent Chinese blocks on Internet access to use desired sites such as Facebook); Cooper Smith, *The World's Twenty-Four Largest Social Media Sites, and Where Their Next Wave of Growth Will Come From*, BUSINESS INSIDER, (Nov. 29, 2013), <http://www.businessinsider.com/global-social-media-census-2013-10> (last visited Feb. 10, 2015) (“It is estimated that despite its banning, Facebook has almost as many users in China as in the U.S.”).

<sup>24</sup> See Fahad Saleem, *Facebook Inc. (FB) Dedicated Version for China Coming in 2015*, TECHINSIDER (Dec. 26, 2014) (announcing forthcoming version of Facebook for China); Julia Greenberg, *Facebook Says It Has Advertisers in China Despite the Ban*, WIRED (Nov. 4, 2015), <http://www.wired.com/2015/11/facebook-says-it-has-advertisers-in-china-despite-ban/> (last visited Dec. 5, 2015) (explaining that, Facebook is in China in ways that we might not think about. On this point, Mark Zuckerberg said, “For now, the thing that I would leave you with – people think Facebook isn’t in China at all, and that’s actually not true. Our consumer service isn’t active there, but it actually is already one of the biggest advertising markets that we have.”).

<sup>25</sup> “If many people write that the political leaders of this town are stealing money, have mistresses, etc., that’s no problem, but if you say “and let’s go protest,” and what you say is connected to some real world event, your post will be censored. In fact, if you say the leaders of this other town are doing such a great job, we should all meet in the town square to have a rally for them, that post will also be censored.” Gary King, *Social Media Analysis Finds Unexpected Reasons for China’s Censorship*, CRIMSON HEXAGON, <http://www.crimsonhexagon.com/business-intelligence/>

Chinese police “have routinely tried to crack down on alleged online rumors, at times even arresting people” for postings that undermine national harmony and political stability on social media sites.<sup>26</sup>

Government mandated restrictions on free speech, which are unenforceable in Western legal systems, are incorporated in most Chinese social media’s terms of use. Similarly, there are numerous American-style limitations of liability and warranty disclaimer clauses in social media agreements that contravene Chinese consumer law. This Article juxtaposes Chinese and American social media terms of use in order to shed light on the potential clash over legal variations between these two social media superpowers. The rapidly expanding social media sites in both nations will likely result in expensive and time-consuming legal conflicts, unless providers in both countries localize their boilerplate for a globalized social media world.

This article proceeds in three Parts. Part I presents a summary of the principal attributes of the Chinese social media landscape. Our analysis of twenty-five of China’s foremost social media sites reveals that Chinese users are more active creators of content than their American counterparts. Chinese social networks are primarily focused on self-expression through blogs, micro blogs, and e-commerce, while the much smaller American social media universe emphasizes the passive consumption of content created by social networks and shared interest communities. Part II analyzes and compares the terms of use of Facebook, Twitter, and Match.com with six of their Chinese equivalents.<sup>27</sup> Key liability limiting clauses such as the choice of forum, choice of law, warranty disclaimers, caps on damages, pre-dispute mandatory arbitration clauses, anti-class waivers, and user conduct clauses vary sharply between the United States and China. Chinese terms of use address the relationship between the user, national security and the public order. In contrast, American terms of use are, in effect, rights foreclosure

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social-analytics/government/social-media-analysis-finds-reasons-for-china-censorship (last visited Feb. 9, 2015).

<sup>26</sup> Michael Kan, *In China, ‘Defaming Cultural Icons’ Online Can Land You in Jail*, TECHHIVE, (Aug. 21, 2013), <http://www.techhive.com/article/2047103/china-arrests-two-for-using-the-internet-to-defame-cultural-icon.html> (last visited Feb. 5, 2015).

<sup>27</sup> The U.S. sample included: Flixster, Reddit, Imgur, Steam, Hi5, Match.com, FriendFinder, Orkut, Scribd, Tumblr, Technocrati, Yahoo!Group, TripAdvisor, Pinterest, Club Penguin, Academia, LinkedIn, Vine, Klout, WhatsApp, Twitter, Skype, Facebook, Google+, and YouTube.



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clauses that protect the rights of corporate social media providers while minimizing the rights and remedies of consumers.

Part III is an empirical study that investigates differences between terms of use employed by the top twenty-five social media providers in China and a functionally equivalent sample of the largest U.S. social media providers. This larger study reaches conclusions similar to the findings in Part II, which are explained by our examination of contrasts between Chinese and American consumer law. Chinese social media providers are less likely to impose warranty disclaimers, limitations on remedies, or pre-dispute mandatory arbitration because Chinese contract and consumer law disfavors standard form contracts that foreclose consumer rights. In contrast, American courts will not enforce provisions that ban religious speech and criticism of the government that are posted on social media because these provisions are inimical to the First Amendment. Similarly, American terms of use are unenforceable in the People's Republic of China because they privilege corporate actors over the rights of consumers. Social media websites in the United States and China have global ambitions and must devise user agreements that harmonize with the laws and policies of countries where they target users.

## 2. PART I: TOWARD A TYPOLOGY OF CHINESE SOCIAL MEDIA

### 2.1. *Overview of Social Media in China*

The PRC's social media websites are a transformative force in Chinese culture.<sup>28</sup> The Chinese social network sites are evolving separately from their American counterparts such as Facebook, Instagram and Twitter in large part because these giant American-based sites have been blocked in the PRC for lack of conformity to

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<sup>28</sup> See Elin Box, *A Guide to Chinese Social Media: What to Do about It and How to Do It*, WEBCERTAIN, (Feb. 17, 2014), [http://blog.webcertain.com/a-guide-to-chinese-social-media-what-to-do-and-how-to-do-it/17/02/2014/?gclid=ClfMmZ\\_Uv8MCFdNj7AodImkA2g](http://blog.webcertain.com/a-guide-to-chinese-social-media-what-to-do-and-how-to-do-it/17/02/2014/?gclid=ClfMmZ_Uv8MCFdNj7AodImkA2g) (last visited Feb. 5, 2015) (arguing that social media in China is very popular, but particularized).

Chinese legal and cultural practices.<sup>29</sup> The Chinese “appetite for all things social has spawned a dizzying array of companies, many with tools more advanced than those in the West: for example, Chinese users were able to embed multimedia content in social media more than 18 months before Twitter users could do so in the United States.”<sup>30</sup> Youthful entrepreneurs in China are using social media to crowdfund their projects, allowing them to raise seed money they might not get from venture capital.<sup>31</sup> Many of these projects are established through Chinese e-commerce giant, Jingdong’s crowdfunding platform because of the scarcity of angel investors.<sup>32</sup>

Chinese indigenous social media principally targets the Chinese population and is chiefly available in the Chinese language, but it is rapidly expanding its global reach.<sup>33</sup> Baidu, the developer of Baidu Tieba, for example, is headquartered in Beijing, China, but has opened business offices in “Shanghai, major cities in Guangdong Province, Japan, USA, Thailand, Brazil, Egypt and Indonesia.”<sup>34</sup> The social networks in our Chinese sample represent the twenty-five

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<sup>29</sup> See Doug Tsuroka, *China Ousts U.S. Social Media Firms: A Question of Control*, INVESTOR’S BUSINESS DAILY (Oct. 31, 2011), (“U.S.-based social media sites today are blocked by China’s so-called Great Firewall and can’t be accessed locally. They include Facebook, Twitter, YouTube, Flickr and Foursquare.”).

<sup>30</sup> Cindy Chiu, Chris Ip, & Ari Silverman, *Understanding Social Media in China*, MCKINSEY QUARTERLY (Apr. 2012), [http://www.mckinsey.com/insights/marketing\\_sales/understanding\\_social\\_media\\_in\\_china](http://www.mckinsey.com/insights/marketing_sales/understanding_social_media_in_china) (last visited Feb. 9, 2015).

<sup>31</sup> The Securities Association of China recently released the “Measures for the Administrating of Private Equity Crowdfunding (Draft)” in December 2014. See Question 2 of Press Conference on December 26, 2014 of the China Securities and Regulatory Commission, available at [http://www.csrc.gov.cn/pub/csrc\\_en/newsfacts/PressConference/201501/t20150113\\_266540.html](http://www.csrc.gov.cn/pub/csrc_en/newsfacts/PressConference/201501/t20150113_266540.html) (last visited Feb. 12, 2015).

<sup>32</sup> See *Chinese E-Commerce Giant Jingdong Launches Crowdfunding Platform*, CROWDFUND INSIDER, <http://www.crowdfundinsider.com/2014/07/43214-chinese-commerce-giant-jingdong-launches-crowdfunding-platform/> (last visited Feb. 12, 2015) (discussing the launch of Jingdong’s crowdfunding platform as modeled after the presently largest crowdfunding site in China, Demohour).

<sup>33</sup> See Andrew Taylor, *5 Things to Know about Chinese Social Media and 4 Ways to Succeed: Focus on Buyers’ Needs and Stick To Your Brand Identity*, INMAN (Jan. 29, 2014), <http://www.inman.com/2014/01/29/five-things-to-know-about-chinese-social-media-and-four-ways-to-succeed/> (last visited Feb. 12, 2015) (“[C]hinese social media is entirely in the Chinese language . . .”).

<sup>34</sup> *Investor FAQs*, BAIDU, [http://ir.baidu.com/phoenix.zhtml?c=188488&p=irol-faq\\_pf#26140](http://ir.baidu.com/phoenix.zhtml?c=188488&p=irol-faq_pf#26140) (last visited Feb. 15, 2015).

largest social media providers:<sup>35</sup> 51.com,<sup>36</sup> Baihe,<sup>37</sup> Baishehui,<sup>38</sup> Baidu Tieba,<sup>39</sup> Douban,<sup>40</sup> Jiayuan,<sup>41</sup> Kaixin001,<sup>42</sup> Mogujie,<sup>43</sup> Momo,<sup>44</sup> Mop,<sup>45</sup> Netease Weibo,<sup>46</sup> Renren,<sup>47</sup> Sina Weibo,<sup>48</sup> Sohu Weibo,<sup>49</sup>

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<sup>35</sup> Wenzhuo Liu selected the sample of the twenty-five social media sites, located their terms of use, and completed English translations.

<sup>36</sup> *Crunchbase*, 51.COM, <http://www.crunchbase.com/organization/51-com> (last visited Feb. 15, 2015) (“51.com is a provider of social network application services, production, and relevant technology. The company aims to offer users a positive experience in network production and promotes the progress of social networks in China.”); *Terms of Service*, 51.COM, [passport.51.com/index/agreement](http://passport.51.com/index/agreement) (last visited Feb. 7, 2015) (English translation on file with authors).

<sup>37</sup> *Terms of Service*, BAIHE, <http://help.baihe.com/index.php?action=list&cat=573&listid=28#> (last visited Feb. 15, 2015).

<sup>38</sup> *Terms of Service*, BAIHU SHEHUI, <http://bai.sohu.com/user/reg/infoshow.do> (last visited Feb. 12, 2015) (Chinese and English translation on file with authors).

<sup>39</sup> *Terms of Service*, Baidu SPACE, <http://passport.baidu.com/static/passpc-account/html/protocal.html> (English and Chinese translations on file with authors).

<sup>40</sup> *Terms of Service*, DOUBAN, <http://www.douban.com/about/agreement> (last visited Feb. 12, 2015); *Terms of Service*, BAIHE, <http://help.baihe.com/index.php?action=list&cat=573&listid=28#> (last visited Feb. 15, 2015).

<sup>41</sup> *Terms of Service*, JIAYUAN, <http://reg.jiayuan.com/clause.php> (last visited Feb. 15, 2015) (English translation on file with authors).

<sup>42</sup> *Terms of Service*, KAIXIN001, <http://www.kaixin001.com/s/reg.html> (last visited Feb. 12, 2015) (English translation on file with authors).

<sup>43</sup> *Network Services Agreement*, MUSHROOM STREET, <http://www.mogujie.com/trade/faq/index?id=1ii&type=1&ptp=1.BYy2DHHo.GSEiYUOK.36.R9abNO> (last visited Feb. 15, 2015) (English Translations on file with authors).

<sup>44</sup> *Terms of Service*, MOMO, <http://www.immomo.com/agreement.html> (last visited Feb. 12, 2015) (English translation on file with authors).

<sup>45</sup> *Terms of Service*, MOP, <http://www.mop.com/> (last visited Feb. 12, 2015) (English translation on file with authors).

<sup>46</sup> See Xie Tingting, *NetEase Closes Microblogging Service*, CRI ENGLISH (Nov. 11, 2014), <http://english.cri.cn/12394/2014/11/06/1261s851265.htm> (“NetEase, one of the leading online service providers in China, has closed its weibo microblogging service and is encouraging its users to try another social-networking service called Lofter.”).

<sup>47</sup> *Terms of Service*, RENREN, <http://renren.com/info/agreement.jsp> (last visited Feb. 12, 2015) (English translation on file with authors).

<sup>48</sup> *Terms of Service*, SINA WEIBO, <http://weibo.com/signup/v5/protocol> (last visited Feb. 15, 2015).

<sup>49</sup> *Terms of Service*, SOHU WEIBO, <https://passport.sohu.com/regist/agreement> (last visited Feb. 15, 2015) (English translation on file with authors).

Taojianghu,<sup>50</sup> TaoMee,<sup>51</sup> Tencent QQ,<sup>52</sup> Tencent QZone,<sup>53</sup> Tencent Pengyou,<sup>54</sup> Tencent Weibo,<sup>55</sup> WeChat,<sup>56</sup> Tianya,<sup>57</sup> Tuding,<sup>58</sup> Ushi,<sup>59</sup> and Youku/Tudou.<sup>60</sup> Tencent, the developer of the oldest messaging app in China, Tencent QQ, is the parent company for five of the

<sup>50</sup> *Terms of Service*, TAOJIANGHU, <http://www.taobao.com/go/chn/member/agreement.php?spm=a2145.7268393.0.0.Mj0ub8> (last visited Feb. 7, 2015) (English translation on file with authors). Taojianghu is the social networking service that evolved out of was grafted onto Taobao.com, Alibaba's auction and retail Web site. Owen Fletcher, *China's Alibaba adds Social Networking to E-commerce*, PCWORLD, <http://www.pcworld.com/article/169575/article.html>.

<sup>51</sup> *Terms of Service*, TAOME, <http://www.61.com/about/service.html> (last visited Feb. 12, 2015) (English translation on file with authors).

<sup>52</sup> *Service Agreement*, TENCENT QQ, <http://www.qq.com/contract.shtml> (last visited Feb. 12, 2015) (Tencent QQ users are subject to Tencent Terms of Service Agreement and QQ Number Rule.); *QQ Number Rules*, [http://zc.qq.com/chs/agreement1\\_chs.html](http://zc.qq.com/chs/agreement1_chs.html) (last visited Feb. 13, 2015) (English translations on file with authors).

<sup>53</sup> *See Tencent Qzone: The Largest Social Media Website in China*, CHINA INTERNET WATCH, <http://www.chinainternetwatch.com/tag/qzone/> (last visited Feb. 15, 2015) ("Qzone was created in 2005 by Tencent. It allows users to customize their blogs, keep diaries, send photos and listen to music. Gradually, Qzone has transformed from a personal space to the biggest social network open platform, and its monthly active users grew to more than 600 million.").

<sup>54</sup> *Service Agreement*, TENCENT PENGYOU, [http://reg.pengyou.com/agreement\\_office.html](http://reg.pengyou.com/agreement_office.html) (last visited Feb. 7, 2015) (English translation on file with authors). Tencent Pengyou is Tencent's Real Name Social Network.

<sup>55</sup> *Service Agreement*, TENCENT WEIBO, <http://reg.t.qq.com/agreement.php> (last visited Feb. 13, 2015) (English translations on file with authors).

<sup>56</sup> The Tencent Company owns Tencent QQ, Tencent Qzone, Tencent Pengyou, Tencent Weibo and WeChat. *Terms of Service*, WECHAT, [http://weixin.qq.com/agreement?lang=zh\\_CN](http://weixin.qq.com/agreement?lang=zh_CN) (last visited Feb. 12, 2015) (English translations on file with authors).

<sup>57</sup> *Terms of Use*, TIANYA, <http://service.tianya.cn/guize/regist.do> (last visited Feb. 15, 2015) (English translations on file with authors).

<sup>58</sup> *Terms of Use*, TUDING, <http://www.tuding001.com/terms> (last visited Feb. 7, 2015) (English translations on file with authors).

<sup>59</sup> *See Hannah Seligson, Ushi Links in Mainland China*, FORBES (Jan. 5, 2012), <http://www.forbes.com/global/2012/0116/companies-people-dominic-penalosa-linkedin-connecting-china.html> (last visited Feb. 15, 2015) ("Goldman Sachs, McKinsey & Co., Sequoia Capital, Yum Brands, Taobao, Vancl, IBM, Dell and Zynga have posted openings on Ushi Jobs, a portal of 6,000 listings of well-paying positions"). *Terms of Use*, USHI, [http://www.ushi.com/doc.jhtml?key=term\\_of\\_service](http://www.ushi.com/doc.jhtml?key=term_of_service) (last visited Feb. 14, 2015).

<sup>60</sup> *See Youku Press Release, Youku Tudou Awarded MVNO License* (Nov. 21, 2014), <http://ir.youku.com/phoenix.zhtml?c=241246&p=irol-newsArticle&id=1992027> (last visited Feb. 15, 2015) ("Youku Tudou Inc. (NYSE: YOKU) is China's leading Internet television company. Its Youku and Tudou Internet television platforms enable users to search, view and share high-quality video content quickly and easily across multiple devices. Its Youku brand and Tudou brand are the most

twenty-five social media sites in our Chinese sample: Tencent QQ, Qzone, Pengyou, Tencent Weibo, and WeChat. Social networks are an alternative source of information with “government bodies opening 258,700 microblog and 6,000 WeChat accounts to release official information and make contact with people.”<sup>61</sup>

Each Chinese social-media and e-commerce platform has at least two major local players. In microblogging (or Weibo), for example, Sina Weibo and Tencent are Chinese equivalents of Twitter.<sup>62</sup> Large

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recognized online video brands in China. Youku Tudou's American depository shares, each representing 18 of Youku Tudou's Class A ordinary shares, are traded on the NYSE under the symbol 'YOKU.');

YOUKU TUDOU INC, SEC Form 6-K (filed on Nov. 18, 2014). Youku, *Terms of Use*, <http://www.youku.com/pub/youku/service/agreement.shtml> (last visited Feb. 7, 2015); Tudou, *Terms of Use*, <http://www.tudou.com/about/account.php> (last visited Feb. 7, 2015) (English translation on file with authors).

<sup>61</sup> *China Focus: China Issues Report on Press, Highlights Boom of New Media*, XINHUA ECONOMIC NEWS SERVICE (Dec. 29, 2014) (explaining how the Chinese government is employing social media to give citizens information as to services).

<sup>62</sup> See Steven Millward, *China's Forgotten 3rd Twitter Clone Hits 260 Million Users*, TECH IN ASIA (Oct. 12, 2012), <http://news.yahoo.com/chinas-forgotten-3rd-twitter-clone-041051048.html> (last visited Feb. 8, 2015) (reporting on the companies' announcement of exceeding 260 million users and thereby remaining the third largest microblogging service in China); *Sina Weibo Imposes Ban on WeChat Promotion*, GLOBAL TIMES (Nov. 28, 2014), <http://en.people.cn/business/n/2014/1128/c90778-8815200.html>, last visited Feb. 8, 2015) (“WeChat, called ‘weixin’ in Chinese, is owned by Shenzhen-based Tencent, and had 468 million monthly active users in the third quarter.”).

Facebook equivalents include Renren,<sup>63</sup> with 219 million active users,<sup>64</sup> Tencent PengYou,<sup>65</sup> and Kaixin001, with 120,123 unique visitors per day.<sup>66</sup> China's social networks often outpace their American counterparts in adapting new technologies. For example, "Chinese users were able to embed multimedia content in social media more than 18 months before Twitter users could do so in the United States."<sup>67</sup> Table One, below, is a typology of the top twenty-five social media providers in China.

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<sup>63</sup> See Yin Mei, *5 Chinese Social Networks You Need to Watch*, MASHABLE (July 12, 2012), <http://mashable.com/2012/07/02/china-social-networks/> (last visited Feb. 9, 2015) ("Think of RenRen as China's Facebook. After a fierce competition with Kaixin ([www.kaixin001.com](http://www.kaixin001.com)), Renren has come out on top. Originally, Renren lost a lawsuit about its domain name — [www.kaixin.com](http://www.kaixin.com) — because it was so close to Kaixin's. Still, Renren managed to retain ownership of that url, which now re-directs to its site . . . . Renren is poised to take over as the social networking platform for the college-educated population in China.").

<sup>64</sup> See CIW Team, *Renren Had 219 Million MAUs, Less Login Users in Q3 2014*, CHINA INTERNET WATCH (Nov. 24, 2014), <http://www.chinainternetwatch.com/10928/Renren-q3-2014/> (last visited Feb. 9, 2015) ("RenRen.com had approximately 219 million activated users as of September 30, 2014. And, its monthly unique log-in users in September 2014 was approximately 44 million, compared to approximately 50 million in September 2013 according to RenRen unaudited financial results.").

<sup>65</sup> See Julie, *Ten Chinese Social Media Sites You Should Be Following*, SYNTHESIO (Mar. 27, 2013), <http://synthesio.com/corporate/en/2013/uncategorized/10-chinese-social-media-sites-you-should-be-following/#> (last visited Feb. 9, 2015) ("PengYou, meaning "Friend", was developed by Tencent to be a "facebook-like" site. Although, PengYou has less active users than its direct competitors Renren and Weibo, because of its multiple platforms, it's the biggest online community in China in terms of registered users.").

<sup>66</sup> See *Hypestat: Website Analysis and Statistics*, KAIXIN, <http://kaixin001.com.hypestat.com/> (explaining that "Kaixin001.com receives about 120,123 unique visitors and 815,638 (6.79 per visitor) page views per day which should earn about \$960.99/day from advertising revenue. Estimated site value is \$3,045,682.54. According to Alexa Traffic Rank kaixin001.com is ranked number 4,521 in the world and 0.0261% of global Internet users visit it. This site has Google page rank of 7. Site is hosted in Beijing, 22, China and links to network IP address 27.131.222.21"); see also Kaixin001, <http://www.crunchbase.com/organization/kaixin> (last visited Feb. 13, 2015) (Kaixin is a Chinese Social Networking Service For White-Collar Urbanites, Providing Tools Such as Blogging, Photo Sharing, and Social Games."); Richard Simcott, *Social Media Fast Facts: China*, SOCIAL MEDIA TODAY (Feb. 27, 2015), <http://www.socialmediatoday.com/content/social-media-fast-facts-china> (summarizing the most popular social networks in China).

<sup>67</sup> Cindy Chiu, Chris Ip, & Ari Silverman, *Understanding Social Media in China*, MCKINSEY QUARTERLY, [http://www.mckinsey.com/insights/marketing\\_sales/understanding\\_social\\_media\\_in\\_china](http://www.mckinsey.com/insights/marketing_sales/understanding_social_media_in_china) (last visited Feb. 9, 2015).

*Table One: Typology of Chinese Social Network's Predominant Purpose*

Type of Social Network	Social Network Sites	Percentage of Sample
Messaging/Blogs	1. Sina Weibo 2. Tencent Weibo 3. Sohu Weibo 4. Netease Weibo 5. Tencent QQ 6. WeChat	24% (N=6)
Virtual Communities	1. Baidu Tieba 2. Mop 3. TianYa 4. Taomee 5. 51.com	20% (N=5)
Social Connection (Facebook Equivalent)	1. Renren 2. Kaixin 001 3. Tencent Pengyou 4. Baishehui 5. Tencent Qzone	20% (N=5)
Dating	1. Jiayuan 2. Baihe 3. Momo	12% (N=3)
Multimedia Sharing	1. Youku/Tudou 2. Tuding	8% (N=2)
Social Pinboards	1. Taojianghu 2. Mogujie	8% (N=2)
Shared Interest	1. Douban	4% (N=1)
Professional & Business	1. Ushi	4% (N=1)

“Messaging and blogs” is the largest Chinese social media category, followed by virtual communities and Facebook-like social connection sites. Three of the top twenty-five Chinese social media sites are dating sites. Two social networks each are classified as multimedia sharing and social pin board sites. Professional networking and shared interest sites had only one platform among the Chinese top twenty-five social media websites.

### 2.1.1. Blogs, Microblogs, and Messaging

Blogs, microblogs, and instant messaging comprise twenty-four percent of the Chinese social network sample.<sup>68</sup> Sina Weibo,<sup>69</sup> founded in 2009,<sup>70</sup> claims 281 million users, more than twice as many as Twitter.<sup>71</sup> Tencent Weibo, Sohu Weibo, and Netease Weibo are other leading microblog sites. Tencent QQ, also known as QQ, is not just an instant messaging software service but also offers microblogging, games, shopping, and group voice chat.<sup>72</sup> WeChat, China's equivalent to WhatsApp, features Facebook-like social elements such as "moments," which enables users to see updates from friends and businesses much like the Facebook timeline.<sup>73</sup> WeChat is not just for instant messaging, but also incorporates multiple functions including a "social network system, part e-commerce platform

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<sup>68</sup> These websites are Netease Weibo, Sina Weibo, Sohu Weibo, Tencent QQ, Tencent Qzone, Tencent Weibo, and WeChat. "Weibo" is the Chinese word for "microblog."

<sup>69</sup> See Yin Mei, *Five Chinese Social Networks You Need to Watch*, MASHABLE (July 12, 2012), <http://mashable.com/2012/07/02/china-social-networks/> (last visited Feb. 8, 2015) ("Simply describing Sina Weibo as the Twitter of China understates Weibo's unique capabilities and leadership role in the Chinese social media sphere. With more than twice as many users as Twitter, Sina Weibo is an essential platform to more than 22% of the Chinese Internet population. Part of its popularity can be attributed to the ability of users to include images and video, something Twitter is only now beginning to allow.").

<sup>70</sup> See *Sina Weibo Imposes Ban on WeChat Promotion*, GLOBAL TIMES (Nov. 28, 2014), <http://en.people.cn/business/n/2014/1128/c90778-8815200.html> (last visited Feb. 8, 2015) (Sina Weibo, China's version of Twitter has effectively banned users from promoting the country's most popular messaging app WeChat on its platform as the two Internet giants battle for users.).

<sup>71</sup> *Id.*

<sup>72</sup> See *Tencent QQ Instant Messaging Service*, TENCENT QQ, <http://www.tencent.com/en-us/ps/inservice.shtml> (last visited Feb. 8, 2015) ("Tencent QQ provides total solution for Internet-based instant messaging (IM) platform. It supports comprehensive basic online communication functions, including text messaging, video and voice chat as well as online (offline) file transmission. It also supports cross platform communication between PC and wireless terminals. The new QQ2009 edition is fully compatible with Windows XP, Vista, Linux, Mac and other systems. Meanwhile, the third-generation QQ with "Hummer" as its core has strengthened the integration of various Internet services to build a complete, mature and diversified online life platform for users.").

<sup>73</sup> See Miquel Roberg, *The Five Top Social Media Networks in China*, MAXIMIZE SOCIAL BUSINESSES (Mar. 25, 2014), <http://maximizessocialbusiness.com/5-top-social-media-networks-china-12918/> (noting popular social network in China, WeChat's, utilization of Facebook-like social features).



and part marketing tool.”<sup>74</sup> WeChat is “by far the most used mobile social network” because it “is great for sharing pictures and keeping in contact with friends using the video and voice messaging functions.”<sup>75</sup>

### 2.1.2. Virtual Communities

Baidu Tieba, Mop, TianYa, Taomee, and 51.com are virtual communities that account for twenty percent of the top twenty-five social networks in China. Baidu Tieba, an interactive social platform, claims 300 million monthly users and one billion overall registrants.<sup>76</sup> Oak Pacific, the developer of news groups, gaming communities, and virtual entertainment, founded Mop.com, which is the Chinese equivalent of “MySpace” (hi.mop.com), along with a powerful forum (dzh.mop.com).<sup>77</sup> Originally founded in 1997, Mop has evolved into a “rich interactive entertainment platform.”<sup>78</sup> TianYa, which claims seventy-eight million users is an interactive forum<sup>79</sup> on a variety of topics, including business, politics, sports, entertainment, as well as academic research.<sup>80</sup> “Taomee Holdings

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<sup>74</sup> See generally Misha Maruma, *The Complete Guide to China's Major Social Networks*, NANJING MARKETING GROUP (May 16, 2014), <http://www.nanjingmarketing-group.com/blog/complete-guide-china-social-media#ixzz3Nb4V92j4> (last visited Feb. 8, 2015).

<sup>75</sup> *Id.*

<sup>76</sup> See generally Baidu Tieba, CHINA INTERNET WATCH, <http://www.chinainternetwatch.com/tag/baidu-tieba/> (last visited Feb. 16, 2015) (providing the most recent statistics on Baidu Tieba's users).

<sup>77</sup> See Btrax Staff, *Hello, Mop Hi - New Social Networking Site by Oak Pacific*, BTRAX, <http://blog.btrax.com/en/2009/08/29/hello-mop-hi-new-social-networking-site-by-oak-pacific/> (last visited Feb. 16, 2015) (reporting on Oak Pacific's announcement of its new social networking site, Hi.mop.com).

<sup>78</sup> *China SNS Snapshot #: Mop.com, Another 'MySpace' for Self-Proclaiming* (Dec. 13, 2009), <https://jared840.wordpress.com/2009/12/13/china-sns-snapshot-mop-com-another-myspace-for-self-proclaiming/> (last visited Feb. 16, 2015).

<sup>79</sup> China Internet Marketing, GLOGOU, <http://glogou.com/china-online-marketing/tianya.php> (last visited Feb. 16, 2015) (“Founded in February 1999, Tianya.cn is an Internet forum registered in the Hainan province in China. It provides BBS, blog, microblogging, and photo sharing services. Tianya.cn provides forum on a variety of topics, including politics, entertainment, sports, as well as academic research. As of August 2011, it had approximately 56 million registered users.”).

<sup>80</sup> *Your Successful Marketing Campaigns in China starts here*, GLOGOU, <http://glogou.com/china-online-marketing/tianya.php> / (last visited Feb. 16,

Limited is a children's entertainment and media company in China . . . [that has] expanded into various online and offline platforms, including the virtual worlds."<sup>81</sup> The largest social network service provider in China, 51.com, is "jointly invested [in] by Sequoia Capital, SIG Asia Investments (SAI), Giant Interactive, Intel Capital, Redpoint Ventures, and a few others." This virtual community has 160 million registered users.<sup>82</sup>

### 2.1.3. General Social Connection (Facebook Equivalents)

Twenty percent of the twenty-five Chinese sites are Facebook clones, or functional equivalents. No one Chinese social media site is an exact equivalent of Facebook, but Renren, Kaixin001, Tencent Pengyou, Tencent Qzone and Baishehui have imported many similar features.<sup>83</sup> Renren describes itself as the network for everyone:

Renren Inc. operates a leading real-name social networking internet platform in China. Renren, which means 'Everyone' in Chinese, enables users to connect and communicate with each other, share information, create user generated content, play online games, watch videos and enjoy a wide range of other features and services. We believe real name relationships create a stronger and more enduring social graph that is essential in the mobile internet world and difficult to rep-

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<sup>81</sup> *Taomee Holdings Limited*, N.Y. TIMES, <http://topics.nytimes.com/top/news/business/companies/taomee-holdings-ltd/index.html> ("The Company's online entertainment community, www.61.com, hosts virtual worlds by children in the five to 15 age groups in the People's Republic of China.").

<sup>82</sup> Steven Chow, *51.com*, CHINA ONLINE MARKETING, <http://www.china-online-marketing.com/news/china-tech-companies/51-com/> (last updated June 20, 2010).

<sup>83</sup> Thomas Crampton, *Social Media in China: The Same but Different*, CHINA BUSINESS REV. (Jan. 1, 2011), <http://www.chinabusinessreview.com/social-media-in-china-the-same-but-different/> (last visited Feb 5, 2015) ("Facebook holds sway as the default social network, gathering all demographics. The same does not hold true in China, where a handful of social networks attract segmented audiences, ranging from upmarket urban youth to university students and migrant workers").

licate. As of June 30, 2015, our social network had approximately 227 million activated users with over 80% of user time accessing our services through mobile.<sup>84</sup>

Bai Shehui, known as a “white-collar society,”<sup>85</sup> “is a real-name-registered social network site organized by Sohu, one of China's largest Internet portals.”<sup>86</sup> Founded in May 2009, the site features blogs, photos, music, gifts, and games, and its primary users are purported to be working professionals. As of March 2011, Bai Shehui had at least 30 million registered users, with 5.2 million active users.<sup>87</sup>

#### 2.1.4. Dating Social Media Sites

Three of the twenty-five Chinese sites (12%) were rating, dating, and mating social media. Jiayuan, for example, has evolved in large part because of China's rapid urbanization.<sup>88</sup> The dating site's typical customers include “blue-collar workers who migrated from towns to big cities in recent years” and “recently urbanized young women” who are “living on their own after migrating to big cities for work and . . . [who find] online dating a practical way to seek a husband.”<sup>89</sup> Jiayuan has “more than 5.7 million active monthly users and 110 million registered users – three times larger than either

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<sup>84</sup> *Investor Relations Overview*, RENREN, <http://ir.renren-inc.com/phoenix.zhtml?c=244796&p=irol-irhome> (last visited Feb. 16, 2015).

<sup>85</sup> “White-collar society,” also known as Bai Shehui in Chinese, is a real-name-registered social network site organized by Sohu, one of China's largest internet portals. Founded in May 2009, the site features blogs, photos, music, gifts, and games, and its primary users are purported to be white collar.” China.org.cn, *Top 15 Social Networks in China* (May 12, 2011), [http://www.china.org.cn/top10/2011-05/12/content\\_22548834\\_4.htm](http://www.china.org.cn/top10/2011-05/12/content_22548834_4.htm) (last visited Nov. 10, 2015).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (“As of March 2011, it had at least 30 million registered users, with 5.2 million active users.”).

<sup>88</sup> Eric Johnson, *Matchmaker Jiayuan Rides Past Baidu on China's Urbanization Wave*, THE STREET (Sep. 5, 2014), <http://www.thestreet.com/story/12869073/1/matchmaker-jiayuan-rides-past-baidu-on-chinas-urbanization-wave.html> (last visited Feb. 7, 2015).

<sup>89</sup> *Id.*

of its competitors, Zhenai and Baihe.”<sup>90</sup> Baihe, founded in 2005, is a leading Chinese dating social network:

It is categorized as a professional dating social network site with high efficiency, quality and credibility. Each registered user must answer a 30-minute love-related psychological test, and then Baihe recommends proper individuals to date according to test results. As of March 2011, the site had more than 23 million registered users – most of them white-collar workers – and Alexa CN ranks it the 412th most popular website.<sup>91</sup>

Beijing Momo Technology Company independently created Momo, a leading Chinese dating application, while Alibaba partially financed this social media venture.<sup>92</sup> Momo’s founder was a former employee of NetEase, which launched the microblogging site NetEase Weibo in 2007. Momo enables its Chinese users “to connect with people in your immediate area, using geo-positioning, for quick hook-ups. It is popular amongst foreigners and Chinese students.”<sup>93</sup>

#### 2.1.5. Multi-Media Sharing

Two of the twenty-five Chinese social networks (8%) were Multi-Media Sharing sites. YouKu/Tudou, China’s top YouTube-like video sharing sites, were also content-creators where users shared multi-media content.<sup>94</sup> China’s multi-media social networks

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<sup>90</sup> *Id.*

<sup>91</sup> Lin Liyao, *Top 15 Social Networks in China*, CHINA.ORG.CN (May 12, 2011), [http://www.china.org.cn/top10/2011-05/12/content\\_22548834\\_2.htm](http://www.china.org.cn/top10/2011-05/12/content_22548834_2.htm) (last visited Feb. 16, 2015).

<sup>92</sup> Owen Fletcher, *China’s Alibaba adds Social Networking to E-commerce*, PCWORLD, <http://www.pcworld.com/article/169575/article.html> (last visited Feb. 7, 2015) (“Alibaba is crafting social-networking platforms specifically to complement two of its core operations. The beta version of a Web site with Facebook-style applications and a Twitter-style feed is being grafted onto Taobao.com, Alibaba’s auction and retail Web site”).

<sup>93</sup> Misha Maruma, *The Complete Guide to China’s Major Social Networks*, NANJING MARKETING GROUP (May 16, 2014), <http://www.nanjingmarketinggroup.com/blog/complete-guide-china-social-media#ixzz3Nb4V92j4> (last visited Feb. 14, 2015).

<sup>94</sup> Steven Millward, *Shareholders Approve: Youku and Tudou Sitting in a Tree*, M-E-R-G-I-N-G, TECHINASIA (Aug. 20, 2012), <https://www.techinasia.com/youku->

tend to incorporate more pirated and professionally produced content than YouTube:

Rather than short videos of cute animals or silly domestic mishaps that may be popular among YouTube watchers, Youku and Tudou are filled with longer form content, up to 70 percent of which is professionally produced. Users in China spend up to an hour per day on the sites, compared with less than 15 minutes spent by Americans on YouTube. In the way they present programs, the Chinese sites seem more like online television stations or a replacement for digital video recorders.<sup>95</sup>

Tuding is an Instagram-like photo filter and sharing site.<sup>96</sup> Rather than a direct copy of Instagram, Tuding users can offer voice responses to their friends' photos.<sup>97</sup>

#### 2.1.6. Social Pinboards and Shopping Sites

Tiaojianghu and Mogujie are Chinese social networking platforms for on-line shoppers. Taobao, the largest Chinese e-commerce site, created Taojianghu in 2009, "aiming for reinforcing connections between its customers for trustworthy online shopping experience which would in turn, leads to increased transactions."<sup>98</sup> Mogujie, China's Pinterest equivalent, also combines online shopping experience with a virtual bulletin board.<sup>99</sup> This social pinboard site focuses

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tudou-shareholders-agree-merger/ (last visited Feb. 8, 2015) (explaining that YouKu and Tudou, once multi-media rivals, have joined forces in a merger in 2012).

<sup>95</sup> Thomas Crampton, *Social Media in China: The Same But Different*, CHINA BUSINESS REV. (Jan. 1, 2011), <http://www.chinabusinessreview.com/social-media-in-china-the-same-but-different/> (last visited Feb. 8, 2015).

<sup>96</sup> Yasmin Li, *Tuding User Statistics - Photo, Weibo, LBS. What's Next*, TECHNOD (May 9, 2011) <http://technode.com/2011/05/09/tuding-user-statistics-photo-weibo-lbs-sns/> (last visited Feb. 15, 2015).

<sup>97</sup> *Audio is in! New Photo Sharing Social Media*, THEM, <http://www.them.pro/Tuding> (last visited Feb. 15, 2015).

<sup>98</sup> Ben Jiang, *China Social Commerce Landscape: Fall Of The Giant And Rise Of The Startups*, TECHNOD (May 31, 2011), <http://technode.com/2011/05/31/china-social-commerce-landscape-fall-of-the-giant-and-rise-of-the-startups/> (last visited Feb. 16, 2015).

<sup>99</sup> *Id.*, ("Mogujie is a buyer-based social network service that provides services to female internet users in China.").

on “female users, with front page categories for women’s clothing, shoes, handbags, home furnishings, and the like.”<sup>100</sup> A substantial amount of all pinned items head to the largest e-commerce site, Taobao.com.<sup>101</sup> With more than 80 million registered users, and 7 million daily active users,<sup>102</sup> Mogujie is a social networking hybrid that features social media and e-commerce.<sup>103</sup>

#### 2.1.7. Shared Interests

Douban, a social review site where users swap recommendations for books, music and films, is the only Chinese shared-interest social media site in the sample. Chinese shared interest sites are far less developed than its general social networks, blogging, microblogging, messaging, or virtual communities. Douban’s niche is young people who self-identify as hipsters:

It is where “cool” young Chinese hang out – they have (or pretend to have) good tastes in book, music, and movies. Most of them have their own blogs, independent or free. They know how to shoot awesome photos, can write powerful or sad words, share their views on Nietzsche or Schopenhauer and want to express their love for John Lennon and the Beatles.<sup>104</sup>

#### 2.1.8. Professional & Educational Networks

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<sup>100</sup> Steven Millward, *Mogujie: China’s Biggest Pinterest Clone is a Social Commerce Money Machine*, TECHINASIA (Apr. 16, 2011), <https://www.techinasia.com/mogujie-social-commerce-success-in-china-taobao/> (last visited Feb. 15, 2015).

<sup>101</sup> *Id.*

<sup>102</sup> *About Us*, MOGUJIE, [http://www.mogujie.com/us/?ptp=1.Bvij3Gw2\\_foot.4.x5w4wD](http://www.mogujie.com/us/?ptp=1.Bvij3Gw2_foot.4.x5w4wD) (last visited Feb. 15, 2015).

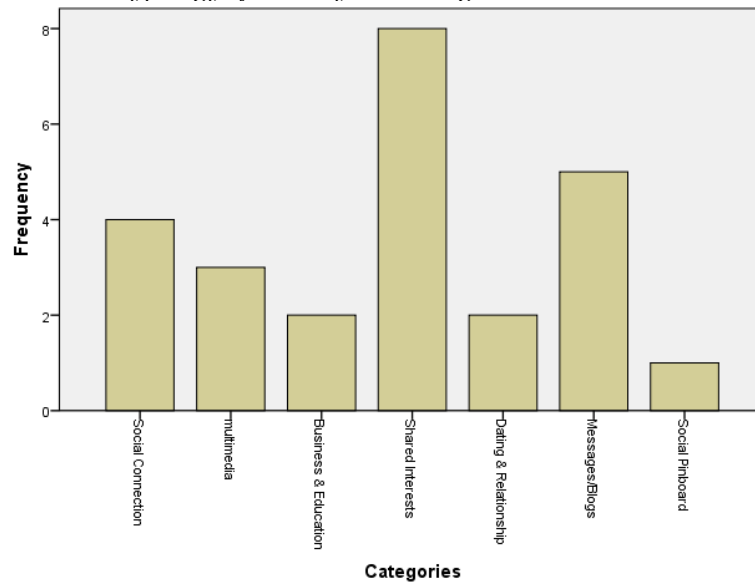
<sup>103</sup> Millward, *supra* note 100, (“Mogujie.com, according to its own stats, has quickly grown to have 9.5 million registered users by the end of last month, of whom 2.2 million are active daily visitors who browse about 750,000 items on Taobao every day, and end up buying 60,000 of those. Yes, 60,000 actual online orders each day from its users. That’s some serious social commerce right there.”).

<sup>104</sup> *One Word, One SNS*, CHINESE SEO SHIFU, <http://chineseseoshifu.com/blog/one-word-one-sns.htm> (last visited Feb. 16, 2015); Mogujie, CRUNCHBASE, <https://www.crunchbase.com/organization/mogujie> (last visited Feb. 16, 2015).

Chinese companies and foreign firms doing business in China are increasingly using social media to recruit employees and to advertise the positive features of their companies. Only one of the top twenty-five Chinese social media were classifiable as professional and educational sites. Ushi, founded in 2010<sup>105</sup> by one hundred China-based entrepreneurs and executives,<sup>106</sup> is the Chinese equivalent of LinkedIn. Ushi is “a fast-growing business social networking service that is connecting China’s white collar professionals and entrepreneurs via mobile phones and PCs, making it easier to find new customers, jobs, experts, and contacts”<sup>107</sup> with 1.2 million registrants. Like LinkedIn, Shanghai-based “Ushi is focused on helping its members to expand and maximize the value of their professional networks, to achieve greater success.”<sup>108</sup>

#### 2.1.9. Chinese & U.S. Social Media Categories Compared

**Table Two:** Typology of Twenty-Five Largest U.S. Social Networks



(last visited Feb. 15, 2015).

<sup>106</sup> Pascal-Emmanuel Gobry, *Ushi Is Embarrassing LinkedIn in China*, BUSINESS INSIDER (Dec. 21, 2010), <http://www.businessinsider.com/the-10-asian-tech-companies-that-are-putting-american-ones-to-shame-2010-12?op=1>.

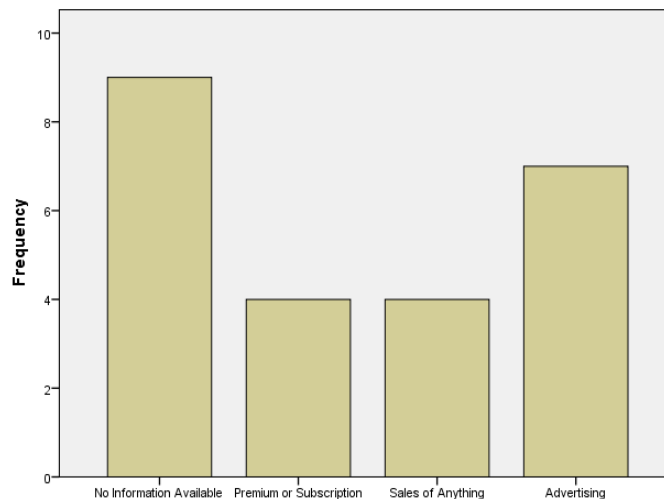
<sup>107</sup> *Ushi.cn*, LINKEDIN, <https://www.linkedin.com/company/www.ushi.cn> (last visited Feb. 15, 2015).

<sup>108</sup> *Id.*

The top twenty-five social media sites in the U.S sample are Academia, Club Penguin, Facebook, Flixster, FriendFinder, Google+, Hi5, Imgur, Klout, LinkedIn, Match.com, Orkut, Pinterest, Reddit, Scribd, Skype, Steam, Technocrati, TripAdvisor, Tumblr, Twitter, Vine, WhatsApp, Yahoo!Group, and YouTube. Eight of the twenty-five U.S. social networks were shared interest sites (32%) as compared to only one of the twenty-five Chinese sites (4%). Five of the twenty-five Chinese social media sites (N=5, 20%) were Facebook-like social networks, as compared to four of their American counterparts (N=4, 16%). Thirty percent of China's largest social media sites were classified as message or blog-based (N=6, 24%), as opposed to twenty percent of the U.S. sites (N=5). Pinterest is the only virtual bulletin board in the top twenty-five U.S. sites. The U.S. had two sites in the top twenty-five that were predominately professional or education sites while China only had one, Ushi.

Table Three (below) depicts the chief sources of revenue for the twenty-five Chinese social network sites. Data was publicly reported on sixteen of the twenty-five leading sites.

*Table Three: Chief Revenue Sources of Chinese Social Media*



Fifty percent of the sixteen Chinese social media sites chiefly profited from advertising. Twenty-five percent of the sites relied upon virtual sales and services including online gaming.



Chinese social media sites, like their U.S. counterparts, are big businesses that commoditize users' personal data, sell advertising, virtual goods, and services.<sup>109</sup> Several of China's established e-commerce websites developed social media and grafted them onto already popular sites.<sup>110</sup> China's eBay equivalent, Alibaba, grafted Taojianghu, a social networking platform, onto Taobao.com, the company's main retail and auction site in 2009.<sup>111</sup> Tencent,<sup>112</sup> a leading telecomm in China, launched the first instant services platform, QQ in 1999<sup>113</sup> and added the social media site, Qzone, in 2005.<sup>114</sup> Chinese media sites are particularly attractive to advertisers and ecommerce providers because they are far more likely to be used for making purchasing decisions than their equivalents in the United States and Western Europe. An empirical study found that "82% of

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<sup>109</sup> "For instance, social network games: allow interactions between players who are not directly connected to a console, are less elaborate and expensive, derive revenue primarily from advertising or in-game purchases, leverage an existing social network, and have a large user base." *Kickflip, Inc. v. Facebook, Inc.*, 999 F. Supp. 2d 677 (D. Del. 2013) (explaining advertising revenue models for social media).

<sup>110</sup> "The entertainment-based platform for Taobao in particular combines standard social-networking functions with original features that promote online purchases. It goes a step beyond efforts to mix e-commerce and social networking by Western companies like Amazon.com and Facebook, said Benjamin Joffe, CEO of digital strategy and research company +8\* (Plus Eight Star)." Owen Fletcher, *China's Alibaba Adds Social Networking to E-Commerce*, IDG NEWS (Aug. 4, 2009), <http://www.pcworld.com/article/169575/article.html> (last visited Feb. 15, 2015).

<sup>111</sup> *Id.* ("Alibaba is crafting social-networking platforms specifically to complement two of its core operations. The beta version of a Web site with Facebook-style applications and a Twitter-style feed is being grafted onto Taobao.com, Alibaba's auction and retail Web site, a spokeswoman said. A more professional platform that the spokeswoman likened to LinkedIn is being added to Alibaba.com, the group's business-to-business e-commerce operation.").

<sup>112</sup> Tencent is thought of as a platform for the masses and was essentially built on the QQ Instant Messaging service. With a QQ account, a user can get access to all of Tencent's different services. In other words, it's the equivalent of a social media hub. Yes, Tencent's social networking site Pengyou has lower numbers of active users than Weibo, and Renren. However, because of its multiple platforms, it maintains the biggest community in China in terms of sheer registered users. Yin Mei, *5 Chinese Social Networks You Need to Watch*, MASHABLE (July 12, 2012), <http://mashable.com/2012/07/02/china-social-networks/> (last visited Feb. 12, 2015).

<sup>113</sup> "What's QQ," QWHATIS, <http://www.qwhatis.com/what-is-qq/> (last visited Feb. 12, 2015).

<sup>114</sup> Tencent Qzone, *The Largest Social Media Website in China*, CHINA INTERNET WATCH, <http://www.chinainternetwatch.com/tag/qzone/> (last visited Feb. 15, 2015) (explaining, "Tencent created Qzone in 2005. It allows users to customize their blogs, keep diaries, send photos and listen to music. Gradually, Qzone has transformed from a personal space to the biggest social network open platform, and its monthly active users grew to more than 600 million.").

Chinese social network users say that social media has influenced their purchase decision; in Singapore the figure is 74%; in Spain, Italy, and the U.S. the average is 55%; the average for the seven remaining countries surveyed is 42%.<sup>115</sup>

Many of the Chinese sites have diversified sources of revenue even more varied than their American counterparts. For example, Renren utilizes both online gaming and advertising as revenue streams. NetEase, the parent corporation of NetEase Weibo, a microblog, reported advertising revenue in its 2014 Third Quarter Unaudited Report:

Our growth was led by a 16.8% increase in revenues from our online game services, a 60.1% increase in advertising services and increasing contribution from our e-mail, e-commerce and others business, which improved by 252.5% compared with the third quarter of 2013.<sup>116</sup>

A Tencent holding company owns multiple social media networks. The conglomerate's largest profits come from mobile gaming sales.<sup>117</sup> Tencent's terms of use requires its users to accept third party advertisements and promotional messages in return for using the service at no charge.<sup>118</sup>

Premium services and subscriptions are appearing in the Chinese social media space. The social media giant reserves the right to impose tolls or fees in the future:

Part of Tencent's services charges a fee. If you are using these services, please comply with the relevant agreements . . . Based on the actual need Tencent may start to charge fee

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<sup>115</sup> *M-Commerce, Social Media, ROPO (Research Online, Purchase Offline) Lead Retail Trends, According to Digitas LBI Global Survey; 49% of Consumers Surveyed Say Smartphones Have Changed the Way They Shop; 88% Use the Internet to Research Online, Purchase Offline (ROPO); Influence*, PR Newswire (April 3, 2014), <http://www.prnewswire.com/news-releases/m-commerce-social-media-ropo-research-online-purchase-offline-lead-retail-trends-according-to-digitaslbi-global-survey-253717951.html>.

<sup>116</sup> *NetEase Reports Third Quarter 2014 Unaudited Financial Results*, PR NEWswire (Nov. 12, 2014), <http://www.prnewswire.com/news-releases/netease-reports-third-quarter-2014-unaudited-financial-results-282483671.html> (Stating that "NetEase, Inc. (NASDAQ: NTES), one of China's leading Internet and online game services providers, today announced its unaudited financial results for the third quarter ended September 30, 2014.").

<sup>117</sup> *Tencent Third-Quarter Profit Misses Forecast*, SHENZHEN DAILY (Nov. 14, 2014), [http://www.szdaily.com/content/2014-11/14/content\\_10674577](http://www.szdaily.com/content/2014-11/14/content_10674577).

<sup>118</sup> *Terms of Service*, at §7.1, TENCENT QQ.

for services that are currently offered free. Before modifications and changes start, Tencent will give a notice in the appropriate service page. If you do not agree with the modifications, you should stop using the service.<sup>119</sup>

“Tencent’s total revenues were RMB19,808 million (USD 3,220 million) in Q3 2014, an increase of 28% YoY. Profit for the period was RMB5,676 million (USD 923 million), an increase of 46% YoY.”<sup>120</sup> Ushi.com, a LinkedIn look-alike site, already charges its users for premium services:

While Ushi bills itself as a straight-up professional networking site, it has a more robust ecosystem that allows users to go beyond just making virtual connections. For around \$4 Ushi members can apply for a job that pays at least \$18,800 a year. And sometimes those jobs come to members. Jian Baoji, a recruiter, was scouring different websites for a chief marketing executive at a materials company and found the ideal one on Ushi. Jian sent the prospective candidate a direct message and, after some back-and-forth, got him hired in July with a salary of \$170,000. China’s recruiting market is booming, and it’s all about recruiting knowledge workers.<sup>121</sup>

#### 2.1.10. Chinese Social Media Gone Public

Perhaps the best unobtrusive measure of China media sites’ financial success is that nearly one in three parent companies of the top twenty-five Chinese social networks have gone public on U.S. stock exchanges in recent years. When China’s “Twitter” floated on the U.S. stock market, it was celebrated in China. The night Weibo went public a building in Nanjing’s CBD flashed the message: 祝贺

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<sup>119</sup> *Id.* at §8.1, §8.2.

<sup>120</sup> Incitez China, *Tencent QQ MAUs 820M, Wechat MAUs 468M in Q3 2014*, CHINA INTERNET WATCH (Nov. 13, 2014), <http://www.chinainternetwatch.com/10711/tencent-q3-2014/> (last visited Feb. 15, 2015).

<sup>121</sup> Hannah Seligson, *Ushi Links in Mainland China*, FORBES MAGAZINE (Jan. 5, 2012), available at <http://www.forbes.com/global/2012/0116/companies-people-dominic-penalosa-linkedin-connecting-china.html> (last visited Feb. 15, 2015).

微博上市, [Congratulations to Weibo] for floating on the stock exchange."<sup>122</sup> As Table Four, below, confirms, a number of these large Chinese social media sites were able to raise large sums in their U.S. IPOs. Momo, China's top hook-up application,<sup>123</sup> went public on December 11, 2014 raising: "\$216 million in its IPO. The offering was priced at an average of \$13.5, but went up to \$17.02 on the same day. On its first day of trading, the company's shares soared 26%. Momo currently has a market capitalization of \$2.27 billion."<sup>124</sup>

*Table Four: Chinese Social Networks Gone Public*

Social Media Name & Type	Year of Public Offering	Market Capitalization or Other Valuation
Momo, (Chinese dating app) <sup>125</sup>	2014	\$2.21 billion market cap <sup>126</sup>

<sup>122</sup> Misha Maruma, *The Complete Guide to China's Major Social Networks*, NANJING MARKETING GROUP (May 16, 2014), <http://www.nanjingmarketing-group.com/blog/complete-guide-china-social-media> (last visited Nov. 10, 2015).

<sup>123</sup> John Russell, *A Flirting App With 180M Users, Is Latest Chinese Tech Firm to File For A U.S. IPO*, TECHCRUNCH (Nov. 9, 2014), <http://techcrunch.com/2014/11/09/momo-a-flirting-app-with-180m-users-is-latest-chinese-tech-firm-to-file-for-a-u-s-ipo/> (last visited Feb. 10, 2015).

<sup>124</sup> Troy Kuhn, *Why Momo Inc. (MOMO) Slid Almost 14% Yesterday*, BIDNESSETC, <http://www.bidnesstec.com/31421-why-momo-inc-momo-slid-almost-14-yesterday/> (last visited Nov. 10, 2015) ("The social media company went public on December 11, raising \$216 million in its IPO. The offering was priced at an average of \$13.5, but went up to \$17.02 on the same day. On its first day of trading, the company's shares soared 26%. Momo currently has a market capitalization of \$2.27 billion.").

<sup>125</sup> Kurt Wagner, *Chinese Social Network Momo Soars in NASDAQ Debut*, RECODE (Dec. 11, 2014), <http://recode.net/2014/12/11/chinese-social-network-momo-soars-in-nasdaq-debut/> (last visited Feb. 15, 2015); Sonali Basak & Bonnie Cao, *Alibaba-Backed Chinese Chat App Momo Surges in U.S. Debut*, Bloomberg, <http://www.bloomberg.com/news/articles/2014-12-11/alibaba-backed-chat-app-momo-raises-216-million-in-u-s-ipo> (last visited Feb. 7, 2015) ("The IPO comes as Momo's co-founder Tang Yan is being accused of violating terms of his employment agreement by NetEase Inc. . . . Tang has informed us [Momo] that he believes the allegation are malicious and intends to vigorously defend himself against them.").

<sup>126</sup> *Companies in China*, NASDAQ, <http://www.nasdaq.com/screening/companies-by-region.aspx?region=Asia&country=China&page=2> (last visited Feb. 10, 2015).

Social Media Name & Type	Year of Public Offering	Market Capitalization or Other Valuation
Sina, <sup>127</sup> parent company of Sina Weibo <sup>128</sup> (Twitter-like microblog)	2011	\$2.46 billion market cap

<sup>127</sup> Sina Corporation (SINA), YAHOO FINANCE, <https://in.finance.yahoo.com/q/pr?s=SINA> (last visited Feb. 12, 2015); *Top 10 Portal Webs in China*, AGENT CHINA, <http://www.agentchina.org/top-10-portal-webs-in-china.html> (last visited Feb. 15, 2015) (“SINA Corporation, through its subsidiaries, operates as an online media company in the People’s Republic of China. . . . The company also offers SINA mobile, a mobile portal, which provides news information and entertainment content from SINA.com for mobile users in mobile browser and application format. In addition, it operates Weibo.com that offers self-expression products to enable users to express themselves on Weibo platform; discovery products to help users discover content; notifications, such as games, VIP membership, and mobile apps; advertising and marketing solutions; and tools and application programming interfaces. Further, the company offers MVAS, which allow users to receive news and information; download ring tones, mobile games, and pictures, customize caller ring back tones, and participate in dating and friendship communities. Additionally, it operates game portal that provides users with downloads and gateway access to online games, information and updates on online and PC games, and value-added application tools. SINA Corporation also provides eReading, a one-stop shop for book reviews; and free email, VIP mail, and corporate email services for enterprise users, as well as operates a Website for bloggers to publish and read original writings. The company was founded in 1997 and is headquartered in Shanghai, the People’s Republic of China.”) (Sina (Chinese: 新浪; pinyin: xīnlàng; i.e. “new wave”) is a Chinese online media company for Chinese communities around the world. Sina operates four major business lines: Sina Weibo, Sina Mobile, Sina Online, and Sina.net. Sina has over 100 million registered users worldwide. Sina was recognized by Southern Weekend as the “Chinese Language Media of the Year” for 2003.)

<sup>128</sup> Propublica, *IPO Gives Us a Look inside Sina Weibo, A Company Struggling with Censorship*, PACIFIC STANDARD (Apr. 21, 2014), <http://www.psmag.com/nature-and-technology/ipo-gives-us-look-inside-sina-weibo-company-struggling-censorship-79734> (last visited Nov. 10, 2014).

Social Media Name & Type	Year of Public Offering	Market Capitalization or Other Valuation
Sohu, <sup>129</sup> parent company of "White-collar society" <sup>130</sup> (general social networking)	2000 <sup>131</sup>	\$2 billion market cap <sup>132</sup>
Jiayuan (dating site) <sup>133</sup>	2011 <sup>134</sup>	\$100 million <sup>135</sup>

<sup>129</sup> *Top 10 Portal Webs in China*, AGENTCHINA, <http://www.agentchina.org/top-10-portal-webs-in-china.html> (last visited Feb. 15, 2015) ("Sohu Weibo Sohu, Inc. (Chinese: 搜狐; pinyin: Sōuhú; literally: "Search-fox") is a Chinese Internet company headquartered in the Sohu Internet Plaza in Haidian District, Beijing. This company and its subsidiaries offer advertising, a search engine, on-line multi-player gaming and other services.").

<sup>130</sup> *Top 15 Social Networks in China*, CHINA.ORG.CN, [http://www.china.org.cn/top10/2011-05/12/content\\_22548834\\_4.htm](http://www.china.org.cn/top10/2011-05/12/content_22548834_4.htm) (last visited Feb. 25, 2015) ("White-collar society," also known as Bai Shehui in Chinese, is a real-name-registered social network site organized by Sohu, one of China's largest internet portals. Founded in May 2009, the site features blogs, photos, music, gifts, and games, and its primary users are purported to be white collar. As of March 2011, it had at least 30 million registered users, with 5.2 million active users.").

<sup>131</sup> *Id.*

<sup>132</sup> *Sina Corp.*, YAHOO FINANCE, <https://in.finance.yahoo.com/q/co?s=SINA> (last visited Feb. 15, 2015) (stating Sohu's market capitalization in a chart of Sino's competitors).

<sup>133</sup> *Chinese Dating Site Jiayuan Going Public*, DATEPRO, <http://www.datepro.com/chinese-dating-site-jiayuan-com-going-public/> (last visited Feb. 15, 2015).

<sup>134</sup> Alina Selyukh, *Jiayuan.com Debut Caught in Chinese IPO Fatigue*, REUTERS (May 12, 2011), <http://in.reuters.com/article/2011/05/11/us-jiayuan-ipo-debut-idINTRE74A5XM20110511> (last visited Feb. 7, 2015) (discussing Jiayuan.com's \$78 million offering).

<sup>135</sup> *Id.*

Social Media Name & Type	Year of Public Offering	Market Capitalization or Other Valuation
Weibo <sup>136</sup> (microblog)	2014 <sup>137</sup>	\$2.87 billion <sup>138</sup>
NetEase <sup>139</sup>	2000 <sup>140</sup>	\$12.93 billion market capitalization; and revenues of \$1.48 billion <sup>141</sup>

<sup>136</sup> *Weibo Corporation [WB] to Ring The NASDAQ Stock Market Opening Bell in Celebration of IPO*, WEIBO, <http://ir.weibo.com/phoenix.zhtml?c=253076&p=irol-newsArticle&ID=1919786>, (last visited Feb. 15, 2015) (“A microcosm of Chinese society and a cultural phenomenon in China, Weibo allows people to be heard publicly and exposed to the rich ideas, cultures and experiences of the broader world. Media outlets use Weibo as a source of news and a distribution channel for their headline news. Government agencies and officials use Weibo as an official communication channel for disseminating timely information and gauging public opinion to improve public services. Individuals and charities use Weibo to make the world a better place by launching charitable projects, seeking donations and volunteers and leveraging the celebrities and organizations on Weibo to amplify their social influence.”).

<sup>137</sup> *Id.* (“Weibo is a leading social media platform for people to create, distribute and discover Chinese-language content. By providing an unprecedented and simple way for Chinese people and organizations to publicly express themselves in real time, interact with others on a massive global platform and stay connected with the world, Weibo has had a profound social impact in China. In March 2014, Weibo had 143.8 million MAUs and 66.6 million average DAUs. Over 70% of our MAUs in December 2013 accessed Weibo from mobile devices at least once during the month.”); *Weibo Corporation [WB]* (“a leading social media platform for people to create, distribute and discover Chinese-language content, will visit the NASDAQ MarketSite in Times Square in celebration of its initial public offering (IPO) on The NASDAQ Stock Market today, April 17.”); *Companies in China*, NASDAQ, <http://www.nasdaq.com/screening/companies-by-region.aspx?region=Asia&country=China>.

<sup>138</sup> *Companies in China*, NASDAQ, <http://www.nasdaq.com/screening/companies-by-region.aspx?region=Asia&country=China&page=3> (listing 2.87 Billion \$/ American Depository Receipts on NASDAQ).

<sup>139</sup> *Investors Questions*, NETEASE, [http://www.ideahk.com/website\\_link/netease/eng/html/investor\\_faq.htm#q4](http://www.ideahk.com/website_link/netease/eng/html/investor_faq.htm#q4) (last visited Feb. 2, 2015) (Explaining that, “4.5 million ADSs (American Depository Shares equivalent to 450,000,000 common shares) were issued on June 30, 2000 at \$15.50 per ADS.”).

<sup>140</sup> Netease Inc., MSN MONEY, <http://www.msn.com/en-us/money/stock-details/fi-126.1.NTES.NAS?ocid=INSFIST10>, (last visited Feb. 21, 2015).

<sup>141</sup> *Id.*

Social Media Name & Type	Year of Public Offering	Market Capitalization or Other Valuation
Youku Tudou Inc. (NYSE: YOKU) (China's YouTube or Internet Television) <sup>142</sup>	2010 <sup>143</sup>	\$3.54 billion on NASDAQ <sup>144</sup> net revenue (Q3): "Net revenues were RMB1.11 billion (\$180.3 million USD), a 29% increase from the corresponding period in 2013." <sup>145</sup>

<sup>142</sup> Youku Tudou, Inc. (Form 6-K) (Nov. 2014)(Exhibit 99.1) Youku Tudou Partners with Xiaomi to Accelerate Multi-Screen Ecosystem Development, available at <http://ir.youku.com/phoenix.zhtml?c=241246&p=iroLSECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbmcueG1sP2lwYWdlPTk5MDg5MTMmRFNFUT0wJlNFUT0wJlNRREVTQz1TRUNUSU9OX0VOVEISRSZzdWJzaWQ9NTc%3d> (last visited Feb. 15, 2015) ("As the No. 1 app and web-based video platform in China, Youku Tudou leads the way in producing original content among Internet companies. Top original content like Searching Divas, On the Road, the Tudou Video Festival and UGC channels have attracted fans to Youku Tudou, forming a large community over time. Youku Tudou's monthly active user base has exceeded 500 million and its daily video views have passed the 800 million mark. Youku App has most recently become the second most popular Chinese mobile app in terms of user time spent, according to iResearch. Youku Tudou's ability in producing original content will provide strong support to the Xiaomi family of hardware by making the user experience more compelling, and will help to boost average revenue per user.").

<sup>143</sup> *Supra* note 138.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*



Social Media Name & Type	Year of Public Offering	Market Capitalization or Other Valuation
Baidu <sup>146</sup> (Parent Company of Baidu Tieba (Social Networking Site enabling creation of personalized home pages) <sup>147</sup> )	2005 <sup>148</sup>	\$80.67 billion <sup>149</sup>

Part II, below, compares the American and Chinese equivalents for Facebook, Twitter, and Match.com. The overwhelming conclusion is that the Chinese equivalents tend to be larger than their American counterparts and their terms of use are more consumer-friendly.

<sup>146</sup> *The Baidu Story*, BAIDU, <http://ir.baidu.com/phoenix.zhtml?c=188488&p=irol-homeprofile> (last visited Jan 15, 2015) (“We provide our users with many channels to find and share information. In addition to our core web search product, we power many popular community-based products, such as Baidu PostBar, the world’s first and largest Chinese-language query-based searchable online community platform, Baidu Knows, the world’s largest Chinese-language interactive knowledge-sharing platform, and Baidu Encyclopedia, the world’s largest user-generated Chinese-language encyclopedia, to name but a few. Beyond these marquee products, we also offer dozens of helpful vertical search-based products, such as Maps, Image Search, Video Search, News Search, and many more. We power these through our cutting-edge technology, continually innovating to enhance these services. Our new Box Computing Open Platform brings users deep-linked content and even applications they can use directly through their search box. We believe that Box Computing will dramatically improve people’s search experience and become ubiquitous across all Internet devices including computers and mobile platforms.”).

<sup>147</sup> C. Custer, *Real-Time System Coming to Weibo, Tieba, and Other Chinese Websites (for Real This Time)*, TECHINASIA (Nov. 10, 2015), <https://www.techinasia.com/realname-system-coming-weibo-tieba-chinese-websites/>.

<sup>148</sup> *Investor FAQs*, BAIDU, [http://ir.baidu.com/phoenix.zhtml?c=188488&p=irol-faq\\_pf#26141](http://ir.baidu.com/phoenix.zhtml?c=188488&p=irol-faq_pf#26141) (last visited Feb. 15, 2015) (stating that Baidu (NASDAQ: BIDU) went public on August 5, 2005 on NASDAQ).

<sup>149</sup> *Companies in China*, NASDAQ, <http://www.nasdaq.com/screening/companies-by-region.aspx?region=Asia&country=China> (last visited Jan 14, 2015).

3. PART II:  
THE LARGEST U.S. AND CHINESE EQUIVALENTS COMPARED

Part II contrasts social media features and terms of use between some of the largest social networking sites in the United States and China. The largest Chinese social media providers parallel the most popular American sites, but are dissimilar in consumer contracting practices, which reflects China's socioeconomic, cultural and legal realities.<sup>150</sup> Table Five, below, juxtaposes Facebook's essential characteristics with two of the largest Chinese equivalents, Renren and Tencent QZone.

3.1. *Facebook and its Chinese Equivalents*

*Table Five: Facebook versus Chinese Facebook Equivalents*

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<sup>150</sup> Thomas Crampton, *Social Media in China: The Same But Different*, THE CHINA BUSINESS REV. (Jan. 2, 2011), <http://www.thomascrampton.com/china/social-media-china-business-review/> (last visited Feb. 6, 2015) ("At first glance, China's social media world closely parallels America's leading social media providers but there are distinct differences, reflecting Chinese socio-economic and legal realities.").

Attribute	Facebook	Renren	Tencent QZone
Type of Service	"People use Facebook to stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them." <sup>151</sup>	Real-name social networking internet platform in China provides gaming and Facebook-like interaction <sup>152</sup>	User "customizes their blogs, keep diaries, send photos and listen to music" <sup>153</sup>
Year Founded	2004 <sup>154</sup>	2005 <sup>155</sup>	2005 <sup>156</sup>

<sup>151</sup> *Our Mission*, FACEBOOK, <http://newsroom.fb.com/company-info/> (last visited Feb. 5, 2015).

<sup>152</sup> *Investor Relations*, RENREN, <http://ir.renren-inc.com/phoenix.zhtml?c=244796&p=irol-irhome> (last visited Feb. 4, 2015) ("Renren Inc. operates a leading real-name social networking internet platform in China. Renren, which means 'Everyone' in Chinese, enables users to connect and communicate with each other, share information, create user generated content, play online games, watch videos and enjoy a wide range of other features and services."); see also Renren, <http://www.renren-inc.com/en/> (last visited Feb. 4, 2015).

<sup>153</sup> Thomas Crampton, *Social Media in China: The Same But Different*, CHINA BUSINESS REVIEW (Jan. 1, 2011), <http://www.chinabusinessreview.com/social-media-in-china-the-same-but-different/> (last visited Jan. 15, 2015) ("QZone (<http://qzone.qq.com>), the first and largest social networking site in China, attracts youth from teens through age 25, often from second- and third-tier cities. A sizable portion of migrant workers, many of whom share personal diaries in a blog-like format, use QZone."); see also *The Story of China's Biggest Social Network: Qzone*, CHINA INTERNET WATCH (Sept. 13, 2013), <http://www.chinainternetwatch.com/3346/tencent-qzone/> (last visited Feb. 6, 2015) (explaining Qzone's rise to the top).

<sup>154</sup> *Supra* note 151.

<sup>155</sup> Yun Hee-Kim and Deborah Kan, *Renren Plans to Sell Some Noncore Business: Chinese Social Network Company Also Weighs Investment in U.S., Hong Kong*, WALL ST. J. (Oct. 28, 2014), <http://www.wsj.com/articles/renren-is-looking-to-divest-several-non-core-businesses-1414476613>.

<sup>156</sup> *The Story of China's Biggest Social Network: Qzone*, CHINA INTERNET WATCH (Sept. 13, 2013), <http://www.chinainternetwatch.com/3346/tencent-qzone/> (last visited Feb. 6, 2015).

Attribute	Facebook	Renren	Tencent QZone
Number of Users	1.39 billion <sup>157</sup>	219 million <sup>158</sup>	645 million <sup>159</sup>
Revenue (U.S. equivalent)	\$12.5 billion <sup>160</sup>	\$21.6 million	\$3.22 billion <sup>161</sup>
Sources of Revenue	Advertising <sup>162</sup>	Games, online advertising <sup>163</sup> and group buying. <sup>164</sup>	Advertisements, virtual goods, and games <sup>165</sup>

<sup>157</sup> *Id.* ("1.39 billion monthly active users as of December 31, 2014").

<sup>158</sup> *Renren Had 219 Million MAUs, Less Login Users in Q3 2014*, CHINA INTERNET WATCH (Nov. 24, 2014), <http://www.chinainternetwatch.com/10928/renren-q3-2014/> (last visited Oct. 30, 2015).

<sup>159</sup> *Tencent: 438M WeChat Users and 645M QZone Users by Q2 2014*, CHINA INTERNET WATCH (Aug. 14, 2014), <http://www.chinainternetwatch.com/8229/tencent-q2-2014/#ixzz3Qk2YyC5D> (last visited Feb. 7, 2015).

<sup>160</sup> Andrew Trotman, *Facebook Revenues Pass \$10bn For First Time*, THE TELEGRAPH (Jan. 29, 2015), <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/digital-media/11375735/Facebook-revenues-pass-10bn-for-the-first-time.html> ("Facebook revenues rose above \$10bn (£6.6bn) for the first time last year after the social network made more money in the past three months than analysts were expecting. The U.S. company said full-year revenues hit \$12.47bn as the firm succeeded in steering advertisers to its mobile platform.").

<sup>161</sup> This financial data is for the entire Tencent corporate family. No data was available for Tencent Qzone alone. See Incitez China, *Tencent QQ MAUs 820M, Wechat MAUs 468M in Q3 2014*, CHINA INTERNET WATCH (Nov. 13, 2014), <http://www.chinainternetwatch.com/tag/qzone/#ixzz3Qk57dSl6> (describing Tencents growth and platforms).

<sup>162</sup> *Revenue for Facebook FY 2014 up 58%*, SOCIALBIZWIRE (Jan. 29, 2015).

<sup>163</sup> *Our Mission*, FACEBOOK, <http://newsroom.fb.com/company-info/> (last visited Feb. 5, 2015).

<sup>164</sup> *Renren Gains from Facebook's Absence in China*, TREFIS (May 3, 2013), <http://www.trefis.com/stock/renn/articles/171218/renren-gains-from-facebooks-absence-in-china/2013-05-03>.

<sup>165</sup> Liz Gannes, *How Tencent Became a 100b Company with a Portfolio of Apps*, ALL THINGS DIGITAL (Oct. 3, 2013), <http://allthingsd.com/20131003/how-tencent-became-a-100b-company-with-a-portfolio-of-apps/>.

As Table Five, above, depicts, Renren is Facebook's closest Chinese equivalent<sup>166</sup> in that it originated as a student-only networking tool that has broadened into a general purpose site.<sup>167</sup> "Facebook entered the Chinese market in 2008," becoming an immediate hit with 285,000 Chinese registered users in the first week.<sup>168</sup> When Facebook was formally blocked in July 2009, indigenous Chinese providers seized the chance to develop innovative social media alternatives.<sup>169</sup> Renren has incorporated unique features that transcend Facebook's fundamental attributes. The Chinese social media giant, for example, launched a free "breakup app" that can eliminate all mentions of an "ex" on its network by clicking "start breakup."<sup>170</sup> Renren has also expanded its revenue sources to include e-commerce activities such as group-buying discounts for members.<sup>171</sup> Qzone is another Facebook equivalent that allows for, "posting blogs, sharing photos, and interacting with other users."<sup>172</sup> Qzone is a social media hybrid combining leading features of Facebook and Tumblr, where users share photos, leave messages and blog."<sup>173</sup>

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<sup>166</sup> See Yin Mei, *5 Chinese Social Networks You Need to Watch*, MASHABLE (July 12, 2012), <http://mashable.com/2012/07/02/china-social-networks/> (last visited Feb. 12, 2015) ("Think of RenRen as China's Facebook. After a fierce competition with Kaixin ([www.kaixin001.com](http://www.kaixin001.com)), RenRen has come out on top. Originally, RenRen lost a lawsuit about its domain name — [www.kaixin.com](http://www.kaixin.com) — because it was so closer to Kaixin's. Still, RenRen managed to retain ownership of that url, which now re-directs to its site . . . . RenRen is poised to take over as the social networking platform for the college-educated population in China.").

<sup>167</sup> Hello, MOP Hi,--New Social Networking Site by Oak Pacific, BTRAX, <http://blog.btrax.com/en/2009/08/29/hello-mop-hi-new-social-networking-site-by-oak-pacific/> (last visited Feb. 19, 2015).

<sup>168</sup> *Facebook's China Foray: China Real Time*, Wall St. J. Blog (June 24, 2008) <http://blogs.wsj.com/chinarealtime/2008/06/24/facebooks-china-foray/> (last visited Nov. 10, 2015).

<sup>169</sup> *Id.*

<sup>170</sup> Li Qian, *Breakup App' Deletes Cyber Traces of Ex-Lovers, No Fuss, No Muss*, SHANGHAI DAILY (Aug. 17, 2013), <http://www.shanghaidaily.com/national/Breakup-app-deletes-cyber-traces-of-exlovers-no-fuss-no-muss/shdaily.shtml>.

<sup>171</sup> *Renren gains from Facebook's Absence in China*, *Supra* note 164.

<sup>172</sup> Robin Wauters, *China's Social Network QZone Is Big, But Is It Really the Biggest?* TECHCRUNCH (Feb. 24, 2009), <http://techcrunch.com/2009/02/24/chinas-social-network-qzone-is-big-but-is-it-really-the-biggest/>.

<sup>173</sup> *Facts and Statistics about Social Networks in China*, STATISTICA, <http://www.statista.com/topics/1170/social-networks-in-china/> (last visited Feb. 9, 2015).

Despite offering analogous services, Renren's and Tencent Qzone's terms of use<sup>174</sup> differ markedly from that of Facebook in ways that reveal the different legal and cultural norms of China. Table Six, below, compares clauses in the terms of use employed by Facebook and two of the largest Chinese functional equivalents: Renren and Tencent Qzone. Neither of the Chinese equivalents include warranty disclaimers, hard caps on total recovery, nor do they incorporate choice of law and forum clauses like Facebook, which requires users to submit to jurisdiction in its home court in California.

*Table Six: Facebook's Terms of Use versus Chinese Equivalents*

Terms of Use Clause	Facebook	Renren	Tencent Qzone
Title of User Agreement	Statement of Rights and Responsibilities <sup>175</sup>	Terms of Service <sup>176</sup>	QQ Space Service Agreement <sup>177</sup>
Choice of Forum	U.S. District Court for the Northern District of California or a state court located in San Mateo County <sup>178</sup>	None	None, users must submit only to the PRC court that has jurisdiction. <sup>179</sup>

<sup>174</sup> *Terms of Service*, RENREN, <http://renren.com/info/agreement.jsp> (Renren's "Terms of Service.").

<sup>175</sup> *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last visited Feb. 3, 2015).

<sup>176</sup> *Terms of Service*, *Supra* note 174.

<sup>177</sup> QQ is an instant messaging service owned by Qzone, a China social media site. See Echo Hu, Nanjing Marketing Group, *Qzone: China's 'Most Valuable' Social Media Brand and Why We Seldom Use It*, CHINA MARKETING NEWSLETTER (June 29, 2012), <http://www.nanjingmarketinggroup.com/blog/social-media/qzone-china%E2%80%99s-%E2%80%98most-valuable%E2%80%99-social-media-brand-and-why-we-seldom-use-it>.

<sup>178</sup> *Statement of Rights and Responsibilities*, *Supra* note 175. (Section 15 outlines where disputes can be resolved).

<sup>179</sup> QQ Space Service Agreement, *Id.* at § 10.5, <http://qzone.qq.com/web/tk.htmlre>.

<b>Terms of Use Clause</b>	<b>Facebook</b>	<b>Renren</b>	<b>Tencent Qzone</b>
Choice of Law	California <sup>180</sup>	None	None, but the law applicable to the mainland areas of China (excluding conflicts of law). <sup>181</sup>
Warranty Disclaimers	Disclaimer of all express or implied warranties <sup>182</sup>	Warranty disclaimer excluding all warranties. <sup>183</sup>	No warranty disclaimers
Caps on Damages	Greater of \$100 or amount user paid in the past twelve months. <sup>184</sup>	None	None
Mandatory Arbitration	None	None	None
Class Action Waivers	None	None	None

<sup>180</sup> *Statement of Rights and Responsibilities*, *Supra* note 175

<sup>181</sup> *QQ Space Service Agreement*, *Supra* note 179. at § 10.3.

<sup>182</sup> *Statement of Rights and Responsibilities*, *Supra* note 175.

<sup>183</sup> *Terms of Service*, *Supra* note 174 at §9.

<sup>184</sup> *Statement of Rights and Responsibilities*, *Supra* note 175. (Facebook's "caps on Damages" at Section 15).

Terms of Use Clause	Facebook	Renren	Tencent Qzone
Prohibition of User Actions That Endanger National Security	None	Compliance with national security law. <sup>185</sup> Users must not “endanger national security, leaking state secrets, subverting state power, undermining national unity.” <sup>186</sup>	Prohibitions against using Qzone to undermine national security, endanger stability, and undermine social order. <sup>187</sup>
Religious Prohibitions	None	User may not “violate the state religion policies or propagate cult and feudal superstition.” <sup>188</sup>	None
Incitement of Ethnic Hatred	None	Bans “incitement to ethnic hatred or ethnic discrimination, undermining national unity.” <sup>189</sup>	None

Facebook’s boilerplate is only reachable by clicking on a hyperlink located in miniscule font in the second row of eighteen hyperlinks at the bottom of its welcome screen.<sup>190</sup> In sharp contrast to

<sup>185</sup> *Terms of Service*, *Supra* note 174 at § 9.

<sup>186</sup> *Id.* at §9(3) (b).

<sup>187</sup> *QQ Space Service Agreement*, *Supra* note 179 at §7.1(1)-(5).

<sup>188</sup> *Terms of Service*, *Supra* note 174 at §9(3) (e) (setting forth Renren’s “Religious Prohibitions”).

<sup>189</sup> *Id.* at §9(3) (d) (Renren’s “Incitement of Ethnic Hatred” clause).

<sup>190</sup> See also, NANCY S. KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* (2013) (proposing a duty for providers to “draft reasonably”).



Renren's terms of use, Facebook forecloses rights of users in their choice of law, choice of forum, and liability limitation clauses. Renren's only rights foreclosure clause, located in its terms of use, is an American-style warranty disclaimer. Facebook's boilerplate excludes every conceivable category of warranty and caps remedies for total damages at \$100 or the amount in fees paid for the preceding year:

WE TRY TO KEEP FACEBOOK UP, BUG-FREE, AND SAFE, BUT YOU USE IT AT YOUR OWN RISK. WE ARE PROVIDING FACEBOOK AS IS WITHOUT ANY EXPRESS OR IMPLIED WARRANTIES INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. WE DO NOT GUARANTEE THAT FACEBOOK WILL ALWAYS BE SAFE, SECURE OR ERROR-FREE OR THAT FACEBOOK WILL ALWAYS FUNCTION WITHOUT DISRUPTIONS, DELAYS OR IMPERFECTIONS. FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS, CONTENT, INFORMATION, OR DATA OF THIRD PARTIES, AND YOU RELEASE US, OUR DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS FROM ANY CLAIMS AND DAMAGES, KNOWN AND UNKNOWN, ARISING OUT OF OR IN ANY WAY CONNECTED WITH ANY CLAIM YOU HAVE AGAINST ANY SUCH THIRD PARTIES. IF YOU ARE A CALIFORNIA RESIDENT, YOU WAIVE CALIFORNIA CIVIL CODE §1542, WHICH SAYS: A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR. WE WILL NOT BE LIABLE TO YOU FOR ANY LOST PROFITS OR OTHER CONSEQUENTIAL, SPECIAL, INDIRECT, OR INCIDENTAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS STATEMENT OR FACEBOOK, EVEN IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. OUR AGGREGATE LIABILITY ARISING OUT OF THIS STATEMENT OR FACEBOOK

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WILL NOT EXCEED THE GREATER OF ONE HUNDRED DOLLARS (\$100) OR THE AMOUNT YOU HAVE PAID US IN THE PAST TWELVE MONTHS. APPLICABLE LAW MAY NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. IN SUCH CASES, FACEBOOK'S LIABILITY WILL BE LIMITED TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW.<sup>191</sup>

Facebook's terms of use give users the right to retain the intellectual property in all information they post, but the user must grant an exclusive worldwide license to the social media provider to use the data until the user deletes it:

You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition: 1. For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.<sup>192</sup>

Renren's terms of use, in contrast, does not claim a license or other right to user generated content, but reserves the user the right to use the provider's intellectual property only when permitted:

Oak Pacific Interactive [holding company of Renren.com] defines information include but not limited to text, software, sound, photographs, video, graphics, advertisement in the entirety, business information provided to the users. Such contents are subject to the protection of copyright, trademark, and the protection of other intellectual property laws and proprietary laws. Therefore, the user can only use the

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<sup>191</sup> *Statement of Rights and Responsibilities*, *Supra* note 175 at § 3.

<sup>192</sup> *Id.* at §2.

contents authorized by the company. Users can not create copies, modifies or create derivatives without the companies' permission.<sup>193</sup>

Facebook's prohibited activities include a ban on spam, multi-level marketing, third-party advertisements, viruses, pornography, and hate speech.<sup>194</sup> These terms are typical of American social media providers that generally craft their categories of forbidden user conduct in ways that maximizes protection of the company's proprietary and corporate interests. In contrast, Chinese social media providers' terms of use focus largely upon protecting the state and the social order. Renren's terms of use, for example, are oriented toward preserving national unity without foreclosing users' rights and remedies:

To use the Internet, users must comply with relevant national policies and laws, including criminal law, national security law, privacy law, computer information system security protection regulations, etc.; and protect national interests as well as national security. Users who violated the laws and policies should bear the full responsibilities themselves.<sup>195</sup>

Tencent Qzone, like Renren, includes clauses that proscribe postings that undermine the social order, and national security interests.<sup>196</sup>

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<sup>193</sup> *Terms of Service*, *Supra* note 174 at § 5, available at <http://renren.com/info/agreement.jsp>.

<sup>194</sup> *Statement of Rights & Responsibilities*, *Supra* note 175 at §3.

<sup>195</sup> *Terms of Service*, *Supra* note 174 at § 3-4.

<sup>196</sup> *QQ Space Service Agreement*, *Supra* note 179 at §7.1 (Users are forbidden from using Renren to post or send messages):

- (a) against the basic principles of the Constitution established;
- (b) endanger national security, leaking state secrets, subverting state power, undermining national unity;
- (c) harm national honor and interests;
- (d) incitement to ethnic hatred or ethnic discrimination, undermining national unity;
- (e) violate the state religion policies or propagate cult and feudal superstition;
- (f) spread rumors, disturbs social order or undermines social stability;

### 3.2. *Twitter and its Chinese Equivalents*

Weibo is Chinese for microblog. China's social media sites are disproportionately microblogging platforms similar to Twitter, but this "understates Weibo's unique capabilities and leadership role."<sup>197</sup> As Table Seven, below, demonstrates, Tencent Weibo and Sina Weibo share many of the same functional attributes as Twitter, but are many times larger. Sina Weibo registered a record "number of tweets per second during Chinese New Year [in 2012], with an average of 32,312 messages sent per second, as an astonishing 481,207 messages were sent during the first minute of the New Year," exceeding Twitter's record.<sup>198</sup> Sina Weibo, which is "accessed

(g) spreading obscenity, pornography, gambling, violence, murder, terrorism or abetting crime;

(h) insult or slander others, or infringe upon the legitimate rights and interests of others;

(i) contain other content laws and administrative regulations prohibited .

4, users in the use of all network services process, must follow the following principles:

(a) comply with the relevant Chinese laws and regulations;

(b) shall not be used for any illegal purpose network service system;

(c) comply with all network services and network protocols, regulations and procedures;

(d) shall not use Renren any network service system may adversely affect the normal operation of the act;

(e) shall not use Renren network service system to transmit any harassing, libelous, abusive, threatening, vulgar or obscene, or any other illegal information;

(f) shall not use Renren any network service system is not conducive to the Thousand Oaks company's behavior.

<sup>197</sup> Yin Mei, *5 Chinese Social Networks You Need to Watch*, MASHABLE (July 12, 2012), <http://mashable.com/2012/07/02/china-social-networks/#MbZMmnwRIuqm>.

<sup>198</sup> *Sina Weibo Saw a Record of over 32,000 'Tweets' Per Second During Chinese New Year*, THENEXTWEB (Jan. 23, 2012), <http://digital-stats.blogspot.co.za/2012/01/sina-weibo-saw-record-of-over-32000.html>; See also, Jon Russell, *Move Over Twitter, Sina Weibo Clocked 32,312 Messages Per Second During Chinese New Year*, NEXTWEB (Jan. 23, 2012), <http://thenextweb.com/asia/2012/01/23/move-over-twitter-sina-weibo-clocked-record-32312-messages-per-second-during-chinese-new-year/> (citing <http://thenextweb.com/asia/2012/01/23/move-over-twitter-sina-weibo-clocked-record-32312-messages-per-second-during-chinese-new-year/>)(discussing the record number of messages on Chinese app, Sina Weibo).

by 22% of Chinese users[,] has enhancements such as the ability to include images, videos, comments, and photos in tweets," which were introduced eighteen months before Twitter began implementing these features.<sup>199</sup>

Tencent Weibo is now available in English as the site moves to globalize its user base<sup>200</sup> and Sina Weibo also has launched an English language site.<sup>201</sup> Twitter launched an office in Hong Kong, even though its service has been blocked in Mainland China since 2009.<sup>202</sup> Table Seven, below, provides quick comparisons between Twitter and its two largest Chinese equivalents.

*Table Seven: Twitter vs. Chinese Equivalents*

Attribute	Twitter	Tencent Weibo	Sina Weibo
Type of Service	Enables users to send and read short 140-character messages called 'tweets' <sup>203</sup>	"works much like Twitter, allowing users to post comments limited to 140 characters." <sup>204</sup>	Same as Tencent Weibo. <sup>205</sup>

<sup>199</sup> *Id.*

<sup>200</sup> TENCENT WEIBO, [http://t.qq.com/?lang=en\\_US](http://t.qq.com/?lang=en_US) (last visited Feb. 3, 2015).

<sup>201</sup> "SINA English is the English-language destination for news and information about China. Find general information on life, culture and travel in China through our news and special reports or find business partners through our online Business Directory." SINA, <http://english.sina.com/weibo/> (last visited Feb. 3, 2015).

<sup>202</sup> Gerry Shih & Mirah Fahmy, *Twitter Opens Hong Kong Office, Gains China Foothold*, Reuters News (March 20, 2015).

<sup>203</sup> IGI GLOBAL, *What is Twitter?*, <http://www.igi-global.com/dictionary/twitter/30754> (last visited Dec. 21, 2015).

<sup>204</sup> Michael Kan, *China's Tencent Launches English Version of Twitter*, PC WORLD (Oct. 11, 2011) [http://www.pcworld.com/article/241654/chinas\\_tencent\\_launches\\_english\\_version\\_of\\_twitterlike\\_service.html](http://www.pcworld.com/article/241654/chinas_tencent_launches_english_version_of_twitterlike_service.html) (describing how Tencent's popularity rose after Twitter was blocked in China).

<sup>205</sup> Laurie Dennis, *Microblogging Chinese Style: Alum Has Sina Weibo for the Badgers*, WISCONSIN CHINA INITIATIVE (Oct. 2012), <http://china.wisc.edu/news/SinaWeibo.html> (last visited Feb. 5, 2015) (describing a University student's experience using the Chinese social media site to promote his American university).

Attribute	Twitter	Tencent Weibo	Sina Weibo
Year Founded	2006	2010 <sup>206</sup>	2009 <sup>207</sup>
Number of Users	284 million <sup>208</sup>	820 million <sup>209</sup>	"500 million registered users and 61 million daily active users" <sup>210</sup>
Revenue (U.S. equivalent)	\$361 million <sup>211</sup>	\$3.22 billion <sup>212</sup>	For the fourth quarter of 2013, SINA reported net revenues of \$197 million. <sup>213</sup>

<sup>206</sup> Rip Emerson, *Tencent v. Sina: A Look at Who's Winning the Battle for China's Tweets* INFOGRAPHIC (Aug. 5, 2011), <http://techcrunch.com/2011/08/05/tencent-vs-sina-a-look-at-whos-winning-the-battle-for-chinas-tweets/>

<sup>207</sup> Xin Hu, *Inside Sina Weibo: The Most Influential Social Platform in China*, WCGWORLD (Sept. 29, 2014), <http://blog.wcgworld.com/2014/09/inside-sina-weibo-the-most-influential-social-platform-in-china/> ("Launched in August 2009, today Sina Weibo is not only the leading player in China's micro-blogging space, but also the most influential platform in the overall social media landscape.").

<sup>208</sup> *Leading Social Networks Worldwide as of January 2015, Ranked by Number of Active Users (in Millions)*, STATISTICA, <http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last visited Feb. 4, 2015).

<sup>209</sup> *Tencent QQ MAUs 820 M, Wechat MAUs 468M in Q3 2014*, CHINA INTERNET WATCH (Nov. 13, 2014), <http://www.chinainternetwatch.com/10711/tencent-q3-2014/> (outlining the success of Tencent in terms of revenue and percentage growth).

<sup>210</sup> Yue Yao, *Sina Weibo's Balancing Act: Increase Revenue or Preserve User Experience?*, MORNINGSTAR (May 22, 2014), <http://analysisreport.morningstar.com/stock/research?t=SINA&region=USA&culture=en-US&productcode=MLE>.

<sup>211</sup> Alex Wilhelm, *Twitter Beats In Q3 With Revenue Of \$361M, But Slowing User Growth Drags Its Shares Down 8%*, TECHCRUNCH (Oct. 27, 2014), <http://techcrunch.com/2014/10/27/twitter-beats-in-q3-with-revenue-of-361m-but-slowing-user-growth-drags-its-shares-down-8/>.

<sup>212</sup> *Tencent QQ MAUs 820 M, Wechat MAUs 468M in Q3 2014*, *Supra* note 209 ("Tencent's total revenues were RMB19,808 million (USD 3,220 million) in Q3 2014, an increase of 28%.").

<sup>213</sup> *SINA Reports Fourth Quarter and 2013 Financial Results* (Feb. 14, 2014), <http://corp.sina.com.cn/eng/news/2014-02-24/150.html> (Official press release including financial totals in dollars and percentage growth).

Attribute	Twitter	Tencent Weibo	Sina Weibo
Sources of Revenue	Promoted tweets, trends, and accounts. <sup>214</sup>	Mobile platforms, subscriptions, Super VIP subscription and the sales of items. <sup>215</sup>	Value added services, memberships, <sup>216</sup> and gaming <sup>217</sup>

Table Eight, below, compares Twitter's standard form boilerplate to that of its leading Chinese equivalents. Twitter's terms of use is an emblematic example of how a provider drafts its terms of use to serve as a systematic rights foreclosure scheme, while Tencent Weibo and Sina Weibo do not include American-style anti-consumer clauses. The Chinese sites, much like Renren and Qzone, prohibit the use of their services to undermine the government and the public order. This type of prohibition would be anathema to Twitter, which follows American legal norms that enable free expression on its services. Table Eight, below, compares Twitter's terms of use to its Chinese counterpart's mass-market contracts.

<sup>214</sup> Alyson Shontell, *The Three Main Sources of Twitter's 600 Million Revenue*, BUSINESS INSIDER (Sept. 17, 2013), <http://www.businessinsider.com/how-twitter-makes-money-2013-9>.

<sup>215</sup> Tencent QQ MAUs 820 M, Wechat MAUs 468M in Q3 2014, *Supra* note 209 ("Tencent's total revenues were RMB19,808 million (USD 3,220 million) in Q3 2014, an increase of 28%.").

<sup>216</sup> Tracey Xiang, *Four Years Later, Sina Weibo Monetization Finally Taking Off*, TECHNOD FR. (Sept. 3, 2013), <http://technode.com/2013/09/03/four-years-later-sina-weibo-monetization-finally-taking-off/>.

<sup>217</sup> *Id.*

*Table Eight: Twitter's Terms of Use vs. Chinese Equivalents*

<b>Terms of Use Clause</b>	<b>Twitter</b>	<b>Tencent Weibo</b>	<b>Sina Weibo</b>
<b>Title of User Agreement</b>	Terms of Service <sup>218</sup>	Tencent Weibo Terms of Service (Subject to Tencent Terms of Service and QQ number rule)	Sina Weibo Service Agreement
<b>Forum Selection</b>	Federal or state courts located in San Francisco, California <sup>219</sup>	"People's courts have jurisdiction." <sup>220</sup>	Chinese jurisdiction <sup>221</sup>
<b>Choice of Law</b>	U.S. federal or California state law. <sup>222</sup>	The law applicable to the mainland areas of China <sup>223</sup>	Chinese law <sup>224</sup>
<b>Warranty Disclaimers</b>	Disclaims all warranties, "as is" or "as available." <sup>225</sup>	None	No warranty disclaimers

<sup>218</sup> *Terms of Service*, TWITTER, <https://twitter.com/tos?lang=en> (last visited Feb. 4, 2015).

<sup>219</sup> *Id.* at §12(B).

<sup>220</sup> *Service Agreement*, TENCENT WEIBO, <http://reg.t.qq.com/agreement.php> at §10.4 (English translations on file with authors).

<sup>221</sup> *Terms of Service*, SINA WEIBO, <http://weibo.com/signup/v5/protocol> at §11.2.

<sup>222</sup> Twitter, *Terms of Service*, *Supra* note 218 at § 12 (B).

<sup>223</sup> *Service Agreement*, TENCENT WEIBO *Supra* note 220 at §10.3 (English translations on file with authors).

<sup>224</sup> Sina Weibo, *Supra* note 221 at § 11.2.

<sup>225</sup> Twitter's disclaimer clause states: "Your access to and use of the Services or any Content are at your own risk. You understand and agree that the Services are provided to you on an "AS IS" and "AS AVAILABLE" basis. Without limiting the foregoing, to the maximum extent permitted under applicable law, THE TWITTER ENTITIES DISCLAIM ALL WARRANTIES AND CONDITIONS, WHETHER EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT." *Terms of Service*, *Supra* note 222 at § 11(A).



<b>Terms of Use Clause</b>	<b>Twitter</b>	<b>Tencent Weibo</b>	<b>Sina Weibo</b>
<b>Caps on Damages</b>	Cap of \$100 or amount paid in preceding 6 months. <sup>226</sup>	None	No caps on damages
<b>Mandatory Arbitration</b>	None	None	None
<b>Class Action Waivers</b>	None	None	None
<b>Prohibition of User Actions That Endanger National Security</b>	None	“post, transmit, distribute, store in violation of national laws, endanger national security and unity, social stability and public order and morals, morality and insulting, defamatory, obscene, violent content” <sup>227</sup>	Compliance with Chinese laws and regulations. <sup>228</sup>
<b>Religious Prohibitions</b>	None	None	None
<b>Incitement of Ethnic Hatred</b>	None	None	None

<sup>226</sup> *Id.* at §11(C) (Twitter’s caps states that an aggrieved user’s recovery is limited to the: “GREATER OF ONE HUNDRED U.S. DOLLARS (U.S. \$100.00) OR THE AMOUNT YOU PAID TWITTER, IF ANY, IN THE PAST SIX MONTHS FOR THE SERVICES GIVING RISE TO THE CLAIM.”).

<sup>227</sup> *Service Agreement*, TENCENT WEIBO *Supra* note 220 at § 3.1.2.

<sup>228</sup> Sina Weibo does not mention national security but its service agreement addresses compliance with Chinese laws and regulations. *Services Agreement*, *Supra* note 221 at § 4.9.3 (prohibits violations of “other laws, regulations, policies and public order and morals, morality, etc.”).

### 3.3. Match.com and its Chinese Equivalents

Table Nine, below, compares Match.com, the largest U.S. online dating site, with two of China's most successful dating sites: Jiayuan and Momo. Match.com is approximately 1/42th the size of Momo and 1/26th the size of Jiayuan. Momo allows users "to connect with people in your immediate area, using geo-positioning, for quick hook-ups. It is popular amongst foreigners and Chinese students."<sup>229</sup> Momo is planning a new mobile application targeting English speakers.<sup>230</sup> Jiayuan.com International Ltd. is the largest online dating service in China providing "single adults with opportunities to meet, interact and form a long-term relationship aimed towards marriage."<sup>231</sup> Jiayuan.com, which "offers users free registration with full search access to its database" receives its revenue from "initial message fees, periodic subscription fees, and revenues from a number of fee-based, value-added services."<sup>232</sup>

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<sup>229</sup> Misha Maruma, *The Complete Guide to China's Major Social Networks*, NANJING MARKETING GROUP (May 16, 2014), <http://www.nanjingmarketing-group.com/blog/complete-guide-china-social-media#ixzz3Nb4V92j4>.

<sup>230</sup> Jon Russell, *Momo, A Flirting App With 180 Million Users, Is Latest Chinese Tech Firm to File For a U.S. IPO* (Nov. 9, 2014), <http://techcrunch.com/2014/11/09/momo-a-flirting-app-with-180m-users-is-latest-chinese-tech-firm-to-file-for-a-u-s-ipo/>.

<sup>231</sup> *Jiayuan.com International Ltd.*, GOOGLE FINANCE, <http://www.google.com/finance?cid=2138098> (last visited Feb. 7, 2015).

<sup>232</sup> *Id.* ("It charges either the sender or the recipient an RMB2.00 fee in order for an initial message to be readable").

*Table Nine: Match.com vs. Chinese Equivalents*

Attribute	Match	Jiayuan <sup>233</sup>	MOMO <sup>234</sup>
Type of Service	Online dating service. <sup>235</sup>	Chinese dating platform. <sup>236</sup>	Chinese dating platform. <sup>237</sup>
Year Founded	1995 <sup>238</sup>	2003 <sup>239</sup>	1997 <sup>240</sup>
Number of Users	4.3 million <sup>241</sup>	110 million <sup>242</sup>	180 million <sup>243</sup>

<sup>233</sup> Lin Liyao, *Top 15 Social Networks in China*, Chinaorg.cn (May 12, 2011), [http://www.china.org.cn/top10/2011-05/12/content\\_22548834\\_8.htm](http://www.china.org.cn/top10/2011-05/12/content_22548834_8.htm) (“Jiayuan.com is considered the largest and the most popular dating site in China. Founded in October 2003, the site features online dating and various real-life blind-dating activities.”).

<sup>234</sup> Troy Kuhn, *Why Momo Inc (MOMO) Slid Almost 14% Yesterday; After Making an Impressive Start on the Nasdaq, the Social Media Company's Stock Plunged on Monday*, BIDNESSETC (Dec. 23, 2014) <http://www.bidnesstc.com/31421-why-momo-inc-momo-slid-almost-14-yesterday/> (“According to a report by Brean Capital, LLC, Alibaba realized Momo’s potential back in 2012, and purchased a 21% stake for \$100 million in the local mobile-based social networking platform. Other investors in the company include Matrix Partners China, Yunfeng Capital, and Sequoia Capital. Momo is in initial talks with Alibaba to step up its partnership, and is looking to enter the advertising business with the Chinese e-retailing giant.”).

<sup>235</sup> *About Us*, MATCH, <http://www.match.com/help/aboutus.aspx?lid=4> (last visited Nov. 10, 2015).

<sup>236</sup> *Jiayuan to Hold Annual General Meeting on December 15, 2015*, JIYUAN INT’L. (Nov. 24, 2014), <http://finance.yahoo.com/news/jiayuan-hold-annual-general-meeting-100000987.html> (stating that Jiayuan International is the “operator of the largest online dating platform in China”).

<sup>237</sup> Kurt Wagner, *Chinese Social Network Momo Soars in NASDAQ Debut*, Re-code, (Dec. 11, 2014) <http://recode.net/2014/12/11/chinese-social-network-momo-soars-in-nasdaq-debut/> (“Momo, a Chinese social network and dating platform, finished its first day of public trading at over \$17 a share — up more than 26 percent from its IPO price. It’s current market cap: \$3.2 billion.”).

<sup>238</sup> MATCH, <https://plus.google.com/+matchcom/videos> (last visited Feb. 5, 2015).

<sup>239</sup> *20F SEC Filing*, JIAYUAN.COM INT’L., (April 30, 2014), 2014 WL 6217578.

<sup>240</sup> Glogou China Media Guide: Digital, Online and Mobile, GLOGOU, <http://www.thechinamarketing.com/china-online-marketing/mop.html> (last visited Jan 25, 2015).

<sup>241</sup> *How Many People Use Match.com*, FIND THE DATA, <http://dating-websites.findthebest.com/q/273/1592/How-many-people-use-Match-com> (last visited Dec. 23, 2015) (noting that Match.com has 4,288,595 monthly users).

<sup>242</sup> *Jiayuan.com Surpasses 110 Million Registered User Accounts*, JIAYUAN, (June 30, 2014), <http://ir.jiayuan.com/releasedetail.cfm?ReleaseID=856970>.

<sup>243</sup> Jon Russell, *Momo, A Flirting App with 180 Million Users, Is Latest Chinese*

Attribute	Match	Jiayuan <sup>233</sup>	MOMO <sup>234</sup>
Revenue (U.S. equivalent)	“Quarter 1 revenue from 2014 is \$740.2 million” <sup>244</sup>	\$81,372,000 <sup>245</sup>	\$ 13.9 million (six months) <sup>246</sup>
Sources of Revenue	Subscription <sup>247</sup>	Message fees, advertising, VIP memberships, priority search. <sup>248</sup>	Stickers, games, and subscriptions <sup>249</sup>

In Table Ten, Match.com’s user agreement is compared to Jiayuan and MOMO, two of the most popular Chinese dating sites. Table Ten, below, provides an additional illustration of the differences in boilerplate language employed in American and Chinese social media user agreements. Match.com’s terms of use shifts the risk of loss to the users, while eliminating rights and remedies, while the Chinese sites do not limit consumer rights. Match.com’s terms

*Techy Firm to File For a U.S. IPO*, TECHCRUNCH (Nov. 9, 2014), <http://techcrunch.com/2014/11/09/momo-a-flirting-app-with-180m-users-is-latest-chinese-tech-firm-to-file-for-a-u-s-ipo/>.

<sup>244</sup> Match.com Information, Statistics, Facts and History, DATING SITE REVIEW, <http://www.datingsitesreviews.com/staticpages/index.php?page=Match-com-Statistics-Facts-History>, (last visited Feb. 5, 2015).

<sup>245</sup> 20F SEC Filing, *Supra* note 239.

<sup>246</sup> Leslie Picker, *Chinese Chat Service Momo Files for U.S. Stock Offering*, BLOOMBERG (Nov. 7, 2014), <http://www.bloomberg.com/news/articles/2014-11-07/chinese-chat-service-momo-files-for-u-s-stock-offering> (“Momo, which began three years ago, generated \$13.9 million in revenue during the first six months of 2014, compared with \$3.1 million in all of 2013.”).

<sup>247</sup> Michael Sebastian, *IAC’s Romance with Online Dating Deepens as Revenue Grow*, ADAGE (July 31, 2013), <http://adage.com/article/media/iac-posts-higher-revenue-strength-dating-sites/243404/>.

<sup>248</sup> 20F SEC Filing, *Supra* note 239 (“We [Jiayuan.com] began charging our users message fees on our online dating platform in October 2008. Prior to this, we generated revenues primarily from charging for non-message related value-added services, such as VIP memberships, priority search rankings and from selling advertisement space on our platform.”).

<sup>249</sup> Josh Horwitz, *Fifty Chinese Chat App Momo Passes 100 Million Registered Users*, TECHINASIA (Feb. 10, 2014), <https://www.techinasia.com/flirty-chinese-chat-app-momo-passes-100-million-users/> (last visited Feb. 5, 2015).

of use are an extreme example of a rights foreclosure scheme, containing a variety of provisions that would be unenforceable in China. Not only does Match.com cap damages at fees paid, but also it disclaims all warranties and eliminates all categories of damages. Match.com requires its users to submit to mandatory arbitration, even though the cost of arbitration will always exceed the total capped damages. In addition, Match.com prohibits members from initiating or joining class actions, which effectively closes the door on any possibility of an asserted cause of action.

The Chinese dating sites have relatively few rights foreclosure clauses, but Jiayuan has a mandatory arbitration clause like Match.com. Jiayuan's thirty-six word arbitration clause is inconspicuous, and almost completely uninformative. Section eighteen of its user agreement, which addresses arbitration, makes no mention of the rules that apply, the cost, the location, the selection criteria for choosing an arbitrator, or any other information that would be useful to the social media user: "Choice of Laws and Jurisdiction: The effectiveness, interpretation and dispute resolution arising of this Service Agreement are subject to the existing laws of [PRC]. Any dispute shall be submitted to the Beijing Arbitration Commission and the arbitration award is final."<sup>250</sup>

Match.com's 813-word arbitration clause, which explains arbitration and how to file a claim, is more than twenty-two times longer than Jiayuan's cryptic provision.<sup>251</sup> In contrast to Match.com's more detailed arbitration clause, Jiayuan does not give its users any information about whether or not it subsidizes the consumer in disputes before the Beijing Arbitration Commission, nor does the Commission provide any specialized consumer protections.<sup>252</sup> Still, American courts would likely uphold Jiayuan's arbitration agreement, following a long string of pro-arbitration decisions by the U.S. Supreme Court.<sup>253</sup> Chinese courts have yet to decide whether inconspicuous terms requiring arbitration of disputes will be upheld in the PRC.

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<sup>250</sup> *Terms of Service*, JIAYUAN, <http://reg.jiayuan.com/clause.php> (last visited Feb 15 2015) at §18.

<sup>251</sup> *Arbitration Procedures*, MATCH.COM, <http://www.match.com/registration/arbitrationProcedures.aspx> (last visited Feb. 8, 2015) at §1.

<sup>252</sup> BEIJING ARB. COMM'N, <http://arbitrator.bjac.org.cn/en/> (last visited Feb. 9, 2015).

<sup>253</sup> *AT&T Mobility L.L.C. v. Concepcion*, 131 S.Ct. 1740 (2011), (striking down

*Table Ten: Match.com Terms of Use vs. Chinese Equivalents*

Terms of Use Clause	Match.com	Jiayuan	MOMO
<b>Choice of Forum</b>	Binding Arbitration administered by American Arbitration Association <sup>254</sup>	None	None
<b>Choice of Law</b>	Texas <sup>255</sup>	None	None
<b>Warranty Disclaimers</b>	Total Disclaimer of Express and Implied Warranties. <sup>256</sup>	None	None
<b>Caps on Damages</b>	Capped at amount paid. <sup>257</sup>	None	None
<b>Mandatory Arbitration</b>	Binding Arbitration Before American Arbitration Association. <sup>258</sup>	Yes, Beijing Arbitration Commission <sup>259</sup>	None

California anti-class waiver contending that class actions are inimical to arbitration); *Marmet Health Care Ctr. Inc. v. Brown*, 132 S.Ct. 1201 (2012) (holding that West Virginia's bar on predispute arbitration in nursing home cases violated the Federal Arbitration Act by exclusion of category of cases; *Am. Exp. Co. v. Italian Colors Rest.*, 133 S.Ct. 2304 (2013) (upholding arbitration clause even though the cost of pursuing arbitration exceeded total possible recovery in state antitrust action); *Marmet Health Care Ctr. Inc. v. Brown*, 132 S.Ct. 1201 (2012); *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012) (holding in part that consumer claims arising under the Credit Repair Organizations Act are subject to mandatory arbitration because Congress was silent on whether these claims were arbitrable.); *Rent-a-Center, West Inc. v. Jackson*, 130 S.Ct. 2772 (2010) (holding that under the Federal Arbitration Association, where decisions regarding the enforceability of an arbitration agreement have been assigned to an arbitrator, a district court may hear challenges on the enforcement provision specifically but challenges to validity must be decided by the arbitrator).

<sup>254</sup> *Terms of Use Agreement*, MATCH.COM §19(a) (Feb. 5 2014), <http://www.match.com/registration/membagr.aspx> [hereinafter Match.com, User Agreement].

<sup>255</sup> *Id.* at § 19(d).

<sup>256</sup> *Id.* at §16(a)(d).

<sup>257</sup> *Id.* at § 18.

<sup>258</sup> *Id.* at § 19(a).

<sup>259</sup> *Member Terms*, JIAYUAN § 18, [reg.jiayuan.com/clause.php](http://reg.jiayuan.com/clause.php).

Terms of Use Clause	Match.com	Jiayuan	MOMO
Class Action Waivers	Yes, Give up right to participate in a class action or class proceeding. <sup>260</sup>	None	None
Prohibition of User Actions That Endanger National Security	No	National security and social order. <sup>261</sup>	National security and social order <sup>262</sup>
Religious Prohibitions	No	Violate state religion, propagate cults or religious superstition. <sup>263</sup>	Violate state religion, propagate cults or feudal superstition. <sup>264</sup>
Incitement of Ethnic Hatred	No	Ethnic hatred or ethnic discrimination <sup>265</sup>	Ethnic hatred or ethnic discrimination <sup>266</sup>

If American social media providers required Chinese consumers to submit to warranty disclaimers and caps on damages, they might

<sup>260</sup> *User Agreement*, MATCH at §19(b).

<sup>261</sup> *Member Terms*, JIAYUAN § 8, [reg.jiayuan.com/clause.php](http://reg.jiayuan.com/clause.php).

<sup>262</sup> *User Agreement*, MOMO, <http://www.immomo.com/agreement.html> at § 4.2(1)(7) (user agreement on file with authors, Chinese and English translation using Baidu's translator program) ("The basic principles of the Constitution determined opposition; (2) endangering national security, leaking state secrets, subverting state power, undermining national unity; (3) harm national honor and interests; (4) to incite ethnic hatred or ethnic discrimination, undermining national unity; (5) violate the state religion policies or propagate cult and feudal superstition; (6) spread rumors, disturbs social order or undermines social stability; (7) spreading obscenity, pornography, gambling, violence, murder, terrorism or abetting crime.").

<sup>263</sup> *Member Terms*, JIAYUAN, *Supra* note 261 at § 8.1.

<sup>264</sup> *User Agreement*, MOMO *Supra* note 262 at § 4.2(5).

<sup>265</sup> *Member Terms*, JIAYUAN, *Supra* note 261 at § 8.1.

<sup>266</sup> *User Agreement*, MOMO, *Supra* note 262 at §4.2(4).

expect to face class actions filed under China's new consumer act. Part I and Part II of this article are, in effect, an early warning to American social media providers that they face a heightened litigation risk in China. U.S. style rights foreclosure clauses, as we shall see in Part III, may face litigation and regulatory scrutiny in China where social media users have non-disclaimable rights and remedies.

#### 4. PART III:

#### TWO WORLDS OF SOCIAL MEDIA CONTRACTS: CHINA VERSUS THE UNITED STATES

Our analysis in Part II highlighted dramatic differences in approach between American social networks' terms of use agreements and their Chinese counterparts. Part III first provides a comprehensive statistical examination comparing twenty-five of the largest U.S. social media providers' terms of use with their Chinese equivalents. This analysis will demonstrate that the findings in Part II are consistent with the larger pattern of Chinese versus American terms of use. Part III then explores the doctrinal basis underlying these diametrically opposed mass-market agreements by comparing U.S. to Chinese contract law. American terms of use contain provisions antithetical to Chinese contract and consumer law, while common Chinese terminology, unless localized to permit free expression, will not be enforceable for public policy reasons in either the United States or the European Union.

##### *4.1. Disclaimers of Warranty Clauses Compared: The United States versus China*

###### *4.1.1. Chinese Warranty Disclaimers*

A few social media sites have localized their terms of use when targeting consumers outside of the PRC. Only three of the twenty-five Chinese social media providers incorporated warranty disclaimers in their terms of service (12%). Of these three exceptions, WeChat, an instant messaging app owned by Tencent Company in



China, includes warranty disclaimers in its international version but not in its domestic terms of use.<sup>267</sup> WeChat's warranty clause in its international terms of use is indistinguishable from its American counterparts that disclaim all express and implied warranties:

APART FROM THIS WARRANTY, TO THE EXTENT PERMITTED BY APPLICABLE LAWS AND REGULATION, ALL OF OUR SERVICES AND SOFTWARE ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS AND NEITHER US NOR ANY OF OUR AFFILIATE COMPANIES MAKE ANY REPRESENTATION OR WARRANTY OR GIVES ANY UNDERTAKING IN RELATION TO OUR SERVICES, OUR SOFTWARE OR ANY CONTENT SUBMITTED, TRANSMITTED OR DISPLAYED BY OUR SERVICES, INCLUDING: (I) ANY REPRESENTATION, WARRANTY OR UNDERTAKING THAT OUR SERVICES OR SOFTWARE WILL BE UNINTERRUPTED, SECURE OR ERROR-FREE OR FREE FROM VIRUSES; (II) THAT OUR SERVICES OR SOFTWARE WILL BE COMPATIBLE WITH YOUR DEVICE; OR (III) THAT OUR SERVICES OR SOFTWARE WILL BE OF MERCHANTABLE QUALITY, FIT FOR A PARTICULAR PURPOSE OR NOT INFRINGE THE INTELLECTUAL PROPERTY RIGHTS OF ANY PERSON. TO THE EXTENT PERMITTED BY APPLICABLE LAWS AND REGULATION, YOU WAIVE ANY AND ALL IMPLIED REPRESENTATIONS, WARRANTIES AND UNDERTAKINGS.<sup>268</sup>

While warranty disclaimers are rarely used in China, sixteen out of the twenty-five terms of use (64%) included a provision that users assume the risk of damages when they use their services. Tencent QQ's service agreement is a typical example:

You understood and agreed that the Service is not designed for specific purposes, including, but not limited to, areas of nuclear facilities, military applications, medical facilities,

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<sup>267</sup> *Terms of Service*, WECHAT (International Version), [http://www.wechat.com/en/service\\_terms.html](http://www.wechat.com/en/service_terms.html) (last visited Feb. 7, 2015); WeChat (China Version) Terms of Service, [http://weixin.qq.com/agreement?lang=zh\\_CN](http://weixin.qq.com/agreement?lang=zh_CN) (English translations on file with authors) (last visited Feb. 7, 2015).

<sup>268</sup> *Terms of Service* (Revised Sept. 4, 2014), WECHAT (International Version), [http://www.wechat.com/en/service\\_terms.html](http://www.wechat.com/en/service_terms.html) (last visited Feb. 15, 2015).

transportation and communications. If the software or the services' operation failure resulted in damages in person, property, environment, or elsewhere, Tencent is not liable.<sup>269</sup>

Kaixin, also known as Happy Net, makes it clear that the user assumes all of the risk of using their service and is the functional equivalent of a general disclaimer:

[Y]ou must be fully aware of the existence of such risks. You expressly acknowledge and assume the risk of using Kaixin services. Kaixin does not assume any responsibility. Kaixin does not guarantee that service will meet your expectation nor does Kaixin guarantee that the service will be uninterrupted, secured and accurate. Kaixin does not guarantee the accuracy and completeness of external links provided on Kaixin's service. Kaixin does not assume any responsibility of the content of these external links.<sup>270</sup>

This "assumption of risk" provision does not divest Chinese consumers of their right to challenge defective software or services. The Contract Law of the People's Republic of China ("PRC" or "Chinese Contract Law") enables customers to recover damages notwithstanding the provider's inclusion of an assumption of risk clause.<sup>271</sup> Under Article 149 of the Chinese Contract statute, a "buyer's assumption of the risk of damage or loss of the subject matter" has no legal effect on whether a buyer can hold a seller liable for "non-conforming performance."<sup>272</sup> If the social media provider supplied software that breached the implied warranty of merchantability and caused damages, the provider is liable for breach of contract even though the users has assumed the risk of using this software.<sup>273</sup>

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<sup>269</sup> *Service Agreement*, TENCENT QQ, § 15.4 (English Translation on file with authors); *See also Services Agreement*, MOP (English Translation on file with authors)

<sup>270</sup> *Terms of Service*, KAIXIN §7, <http://www.kaixin001.com/s/reg.html> (last visited Feb. 11, 2015).

<sup>271</sup> Contract Law of the People's Republic of China (adopted at the Second Session of the Ninth National People's Cong. March 15, 1999, effective on October 1, 1999), art. 149 (1999) (China).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

4.1.2. *Law of Consumer Warranties Compared: The United States versus China*

4.1.2.1. *Express Warranties*

Article 2 of the Uniform Commercial Code defines warranties for the purchase and sale of tangible goods.<sup>274</sup> Judges have little recourse but to stretch U.C.C. Article 2 to software because the United States has no comprehensive law governing software or software services.<sup>275</sup> The express warranties and implied warranties are specified in U.C.C. § 2-313 – §2-315.<sup>276</sup> China has enacted functionally equivalent warranties in PRC Contract Law and the Law of the PRC Protection on Consumer Rights and Interests (“PRC Consumer Protection Law”).

Article 153 of the Contract Law of the People’s Republic of China is a functional equivalent of U.C.C. § 2-313, the express warranties provision, that requires the seller to deliver goods in compliance with the promises made by themselves.<sup>277</sup>

Chinese Contract Law Article 153 states

The seller shall deliver the subject matter in compliance with the prescribed quality requirements. Where the seller gave quality specifications for the subject matter, the subject matter

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<sup>274</sup> U.C.C. §2-313-§2-315.

<sup>275</sup> “While courts have attempted to stretch Article 2 to accommodate the licensing of intangibles, the principles of Article 2 do not correspond to the commercial reality of licensing transactions in most significant respects. For example, the performance obligations of a buyer under Article 2 are a poor match for the obligations of a licensee, as are warranties under Article 2. Article 2 remedies are also ill equipped to address licensing transactions. There is uncertainty whether a software licensor has the right to include a disabling device in its program as the functional equivalent of self-help repossession. Article 2 allows a buyer to reject the whole product if it fails ‘in any respect to conform to the contract.’ Would this ‘perfect tender rule’ of Article 2 permit a licensee to reject a program arbitrarily because it contains a few lines of errant code? The mass-marketing of some Internet security software applications most closely resembles the sale of goods, but even here there are significant differences. For example, goods under U.C.C. sales law are freely assignable, whereas licensors typically attempt to restrict assignability. This is far afield from an Article 2 sale.” Michael L. Rustad & Lori E. Eisenschmidt, *The Commercial Law of Internet Security*, 10 HIGH TECH. L. J. 213, 273 (1995).

<sup>276</sup> *Id.*

<sup>277</sup> Cf. U.C.C. § 2-313 and PRC Contract Law, art. 153.

delivered shall comply with the quality requirements set forth therein.<sup>278</sup>

Similar to U.C.C. § 2-313, the Law of the PRC Protection on Consumer Rights and Interests (“2014 Consumer Protection Law”) Article 23 Clause 2<sup>279</sup> recognizes that product instructions and samples in displaying the products are express warranties created by the seller:<sup>280</sup> “Business Operators who employ advertisements, product instructions, sample or other ways to display the quality state of their commodities or services shall guarantee that the actual quality of the commodities or services they supply is in conformity with that demonstrated.”<sup>281</sup> Social media providers making representations about virtual or tangible goods could be subject to penalties for violating express warranties under current Chinese law. Statistica estimates sales of Chinese virtual goods for 2013 to be \$7.4 billion.<sup>282</sup> A “description of the goods” or “any sample or model” that is made “part of the basis of the bargain” are express warranties created by the seller under U.C.C. §2-313(1) (b)-(c).<sup>283</sup> A special warranty period exists in various regulations depending upon the industry involved. For example, under the Microcomputer Repair Exchange and Return Regulation of the PRC, the warranty period specified for the computer software is three months; for preinstalled software, a one-year period is specified.<sup>284</sup>

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<sup>278</sup> PRC Contract Law, art. 153.

<sup>279</sup> The former Consumer Protection Law also recognizes this provision in article 22. See Law of the People’s Republic of China on Protection of Consumer Rights and Interests (adopted by the Standing Comm. Nat’l Peoples Congr. October 31, 1993 effective January 1, 1994), art. 22, available at <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn174en.pdf>. (1993) (China).

<sup>280</sup> Cf. U.C.C. § 2-313 and 2014 PRC Consumer Protection Law, art. 23.

<sup>281</sup> 2014 PRC Consumer Protection Law, art. 23.

<sup>282</sup> *Estimated Revenue of Virtual Goods Sales in China from 2006 to 2010 With Forecast Until 2013 (in Million U.S. Dollars)*, STATISTICA, <http://www.statista.com/statistics/269323/sales-of-virtual-goods-in-china/> (last visited Feb. 11, 2015).

<sup>283</sup> U.C.C. § 2-313(1)(b)-(c) (2002).

<sup>284</sup> Microcomputer Repair Exchange and Return Regulation of the PRC (微型计算机商品修理更换退货责任规定), appx. 1, available at <http://www.people.com.cn/GB/it/49/149/20020806/793284.html> (last visited Nov. 9, 2014).

*4.1.2.2. Implied Warranties*

Article 62 Clause 1 of the Contract Law of the People's Republic of China ("Chinese Contract Law") is nearly identical to U.C.C. Section 2-314(3) in creating an implied warranty predicated upon "customary standards" or "industry standards."<sup>285</sup> The "customary standard" or "industry standard" is similar to the "course of dealing or usage of trade" language used in U.C.C. Section 2-314 (3).<sup>286</sup> China, unlike the United States, does not allow a seller or vendor to disclaim implied warranties. Nothing in Chinese contract law, including Article 62 of the contract statute, allows the dominant party to require consumers or other buyers to waive implied warranties. In contrast, U.C.C. Section 2-316 permits implied warranties to be "excluded or modified."<sup>287</sup> The last sentence of Article 62 clause 1 requires performance to comply with "any particular standard consistent with the purpose of the contract."<sup>288</sup> This is similar to the implied warranty of fitness for particular purpose as found in U.C.C. Section 2-315.<sup>289</sup> Article 62, cl. 1 of the Chinese Contract Law provides, "If quality requirement was not clearly prescribed, performance shall be in accordance with the state standard or industry standard; performance shall be in accordance with the customary standard or any particular standard consistent with the purpose of the contract."<sup>290</sup>

The 2014 Consumer Protection Law Article 23 clause 1<sup>291</sup> requires business operators to warrant the quality of their product or

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<sup>285</sup> See U.C.C. § 2-314(3) (2002) (stating that "other implied warranties may arise from course of dealing or usage of trade"); see also PRC Contract Law art.62 cl.1 (stating that "the contract shall be performed in accordance with State standards or trade standards . . .").

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> PRC Contract Law, art. 62, cl.1

<sup>289</sup> See U.C.C. § 2-315(2002) (stating that "where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under section 1302.29 of the Revised Code an implied warranty that the goods shall be fit for such purpose."); see also Chinese Contract Law art. 62 cl.1.

<sup>290</sup> PRC Contract Law, art. 62, cl.1.

<sup>291</sup> The former PRC Consumer Protection Law recognizes this provision in article 22, clause 1. See Law of the People's Republic of China on Protection of Consumer Rights and Interests (adopted by the Standing Comm. Nat'l People's Cong. Oct. 31,1993, effective Jan. 1, 1994.), art. 22, available at <http://www.wipo.int/>

services under “normal operation.”<sup>292</sup> This provision closely parallels U.C.C. § 2-314 (2) (c)’s requirement that goods “to be merchantable must be at least fit for the ordinary purposes for which such goods are used,” which is also classified as an implied warranty.<sup>293</sup> The 2014 Chinese Consumer Protection Law states, “Business operators shall guarantee the quality, function, usage and term of validity, which the commodities or services they supply should possess under normal operation or acceptance, except that consumer are aware of the defects before they buy the commodities or receive the services.”<sup>294</sup> China’s implied warranties run with the product and are not disclaimable, unlike in U.S. consumer law.

#### 4.1.3. U.S. Freedom of Contract Approach to Disclaimers

Our empirical data on American social media contracting practices demonstrates that U.S. social media providers routinely disclaim all implied warranties, which is contrary to mandatory Chinese consumer provisions. American social media providers universally eliminate all implied warranties with broad language, such as the statement that a computer program “is provided with all faults, and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user” or similar words.<sup>295</sup> Ninety-six percent of the top twenty-five U.S. social media providers (24 out of 25) follow the methodology of Article 2 of the Uniform Commercial Code (U.C.C.) in disclaiming the implied warranties of merchantability<sup>296</sup> and fitness for a particular purpose.<sup>297</sup>

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edocs/lexdocs/laws/en/cn/cn174en.pdf (1993) (China).

<sup>292</sup> 2014 PRC Consumer Protection Law, art. 23, cl.1.

<sup>293</sup> U.C.C. § 2-314(2)(c)(2002).

<sup>294</sup> 2014 PRC Consumer Protection Law, art. 23, cl.1.

<sup>295</sup> Unif. Computer Info. Transactions Act, available at [http://www.uniform-laws.org/shared/docs/computer\\_information\\_transactions/ucita\\_final\\_02.pdf](http://www.uniform-laws.org/shared/docs/computer_information_transactions/ucita_final_02.pdf) (2002) [hereinafter UCITA]; see UCITA Section 406(b)(1)(3) (disclaiming implied warranties).

<sup>296</sup> U.C.C. §2-316(2) (“Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous”).

<sup>297</sup> Facebook and Twitter both disclaimed warranties following the methodology of U.C.C. §2-316. See U.C.C. §2-316(2)-(3) (“to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.”).

U.C.C. Section 2-316 is the key provision for disclaiming warranties and is notable for not incorporating any consumer protection, except in a few isolated jurisdictions such as Massachusetts.<sup>298</sup> U.C.C. Article 2 liberally allows the dominant party to disclaim or modify all implied warranties by either words or conduct.<sup>299</sup> The U.S. terms of use agreements we examined are, in effect, “boilerplate rights deletion schemes.”<sup>300</sup> American-style terms of use masquerade in the clothing of contract, but constitute a “coercive contracting environment” because of aggressive terms disclaiming warranties and limiting liability.<sup>301</sup> U.S. courts seldom strike down overly aggressive clauses by using the doctrine of unconscionability.<sup>302</sup> China, in contrast, has a blanket prohibition against disclaiming implied warranties of quality.

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<sup>298</sup> See U.C.C. §2-316 (explaining the exclusion or modification of warranties); see also Mass. Gen. Laws Ann. ch. 106, § 2-316A (prohibiting vendors from disclaiming either the implied warranty of merchantability or the fitness for a particular purpose in consumer transactions).

<sup>299</sup> See U.C.C. §2-316 (2002) (permitting the exclusion of implied warranties).

<sup>300</sup> MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* at 39-40, 204 (2013) (describing boilerplate rights deletion schemes that cancel or withdraw rights given by the legislature, such as warranties or remedies under U.C.C. Article 2).

<sup>301</sup> *Id.*

<sup>302</sup> Unconscionability is often pleaded but seldom successful. See *Song Fi Inc. v. Google, Inc. & YouTube*, 72 F. Supp. 3d 53, 64 (D.D.C. 2014) (holding that the choice of forum clause to be unconscionable); See also, *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1010-13 (D.C. 2002) (finding no unconscionability in agreement accepted by clicking online button and holding that “[a] contract is no less a contract simply because it is entered into via a computer”); Courts assess unconscionability by examining the consumer’s level of education, the relative disparity in the parties’ bargaining power; the parties’ relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause. Software vendors can defeat unconscionability claims by evidence that the clauses in dispute are conspicuous. The typical online licensee would not qualify as an illiterate or disadvantaged consumer that the courts will protect. “Courts have developed ‘tests’ of unconscionability which look, as a matter of necessity, to the presence or absence in a given setting of certain oft-encountered ‘indicia’ of unfair bargaining. One frequently cited case holds, for example, that unconscionability ‘generally . . . [includes] an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.’” *Carlson v. Gen. Motors Corp.*, 883 F.2d 287 (4th Cir. 1989) (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449, (D.C. Cir. 1965)).

*4.1.4. Chinese Antithetical Approach to Disclaimers*

Chinese social media providers in our sample rarely disclaimed warranties because Chinese law disfavors American-style standard form contracts, especially contracts taking the form of “take it or leave it” provisions that place consumers at a significant disadvantage. Article 39 (2) of the Contract Law of the People’s Republic of China defines standard terms as “contract provisions which were prepared in advance by a party for repeated use, and which were not negotiated with the other party in the course of concluding the contract.”<sup>303</sup> Terms of use are non-negotiated and prepared in advance by social media providers and are thus classified as standard form contracts under Chinese contract law.<sup>304</sup>

Social media providers exporting their services to China would violate Chinese consumer law by attempting to disclaim warranties. Chinese law voids any boilerplate clauses if “the party that provides the standard clauses exempts itself from the liability, imposes heavier liability on the other party, or precludes the other party from its main rights” under Article 40 of the PRC Contract Law.<sup>305</sup> Article 40 cross-references Articles 52 and 53 of the PRC Contract Law, which specifies certain situations when the standard terms are unenforceable.<sup>306</sup>

A contract that violates Article 52 by attempting to “induce conclusion of the contract through fraud or duress,” or “conceal an illegal purpose under the guise of a legitimate transaction” and “harms the interests of the state, the collective or any third party” is void.<sup>307</sup> This provision extends to all contracting parties in the PRC, including social media providers. In addition, Article 53 prohibits providers from disclaiming the liability for causing physical injury to the other party or disclaiming the liability for causing property damages

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<sup>303</sup> PRC Contract Law, art. 39 (2) (defining “standard terms” in contracts).

<sup>304</sup> *Id.*

<sup>305</sup> See PRC Contract Law art. 40 (invalidating certain standard terms).

<sup>306</sup> *Id.*

<sup>307</sup> A contract is invalid in any of the following circumstances: “One party induced conclusion of the contract through fraud or duress, thereby harming the interests of the state; The parties colluded in bad faith, thereby harming the interests of the state, the collective, or any third party; The parties intended to conceal an illegal purpose under the guise of a legitimate transaction; The contract harms public interests.” PRC Contract Law, art. 52.



when there is intentional misconduct or gross negligence.<sup>308</sup> U.S. courts have not yet recognized video games that are commonly played on Chinese and American social media sites as products for the purposes of products liability. In a leading case, the Sixth Circuit Court of Appeals rejected a products liability claim arising out of a Kentucky school shooting.<sup>309</sup> The plaintiffs contended that the school shooter “regularly played video games, watched movies, and viewed Internet sites produced by the firms.”<sup>310</sup> The law of products liability has not yet evolved in the United States to compensate social media users for physical injuries or death caused by playing online games.<sup>311</sup> Article 40 of the Chinese Contract law does not permit a dominant contracting party such as a social media provider to “exempt itself from liabilities” or attempt to “impose [a] greater burden on the other party.”<sup>312</sup> The dominant party may not preclude the other party from exercising its “material rights” under a contract.<sup>313</sup>

Article 24 of China’s 2014 Consumer Protection Law prohibits business operators from including “format contracts, notices or announcements” to reduce their liability or impose greater burden on the consumer.<sup>314</sup> This law invalidates many common American social media provisions such as caps on damages and warranty disclaimers. Article 24 of the 2014 Consumer Protection Law provides, “[b]usiness operators may not, through format contracts, notices,

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<sup>308</sup> See PRC Contract Law, art. 53 (stating when exculpatory provisions are invalid).

<sup>309</sup> *James v. Meow Media, Inc.*, 300 F.3d 683, 701(6th Cir. 2002) (affirming lower court’s dismissal of product liability claims, finding that information “products” were not encompassed in Kentucky’s strict products liability statute “because thoughts, ideas, and expressions contained within defendants’ movie, games, and website materials did not constitute a “product” within the realm of the strict liability doctrine”).

<sup>310</sup> See *James v. Meow Media, Inc.*, 300 F.3d 683, 688 (6th Cir. 2002) (holding that “video games, movies, and websites were not ‘products’ for purposes of strict liability”); see also *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1281 (D. Colo. 2002) (dismissing actions based on negligence and strict liability in lawsuit filed in the Columbine school shooting case in which it was claimed that the killers were “fanatical consumers of violent video games and movies distributed on the Internet”).

<sup>311</sup> *Id.*

<sup>312</sup> PRC Consumer Protection Law, art. 40 (where the dominant party complies with Articles 51 and 52).

<sup>313</sup> *Id.*

<sup>314</sup> PRC Consumer Protection Law, art. 24.

announcements, entrance hall bulletins and so on, impose unfair or unreasonable rules on consumers or reduce or escape their civil liability for their infringement of the legitimate rights and interests of consumers . . . (such content) shall be invalid.”<sup>315</sup>

In addition, disclaiming the warranty of title or ownership also violates PRC Contract Law, which governs purchase and sale contracts.<sup>316</sup> Article 174 of the PRC Contract Law requires all non-gratuitous contracts, in the absence of relevant provisions in contract law, to be handled “with reference . . . to the relevant provisions governing purchase and sale contracts.”<sup>317</sup> Under provisions governing the purchase and sale agreement, the seller should warrant that there is no impairment to the goods and the ownership of the goods.<sup>318</sup> A social media provider selling either virtual or tangible goods would be prohibited from disclaiming the warranty of title or non-infringement under this provision.

Chinese mandatory contract law requires contract suppliers to “clearly identify the provision that limited his own liability or increased the liability of the other party.”<sup>319</sup> This is similar to U.C.C. Section 2-316 (2) and (3)’s requirement that the seller call the buyer’s attention to warranty disclaimers by making them conspicuous.<sup>320</sup> Article 10 of the 2014 amended Chinese consumer law requires terms in a standard-form contract that limit liability to be conspicuous: “Terms in a standard-form agreement that materially affect a consumer will be effective only if they are conspicuous and draw the consumers’ attention to the information about goods or services

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<sup>315</sup> *Id.*

<sup>316</sup> PRC Contract Law, art. 174 (“Any other non-gratuitous contract shall comply with laws containing relevant provisions and in the absence of such provisions, shall be handled with reference to the provisions governing purchase and sale contracts.”).

<sup>317</sup> *Id.*

<sup>318</sup> See PRC Contract Law, art. 150; See also PRC Contract Law art 62, clause 1 (stating that “where the parties have unclearly stipulated related contents in a contract . . . the contract shall be performed in accordance with State standards or trade standards . . .”).

<sup>319</sup> See PRC Contract Law, art. 39 (“The party supplying the standard terms shall . . . call the other party’s attention to the provision(s) whereby such party’s liabilities are excluded or limited, and shall explain such provision(s) upon request by the other party.”).

<sup>320</sup> See U.C.C. § 2-316 (2)-(3) (stating that in order to exclude or modify any implied warranty of merchantability the exclusion must be “in writing” and “conspicuous”).

that has a material impact on the consumers.”<sup>321</sup> Chinese law also requires the supplier of these standard terms to explain the provisions upon request of the other party.<sup>322</sup>

Chinese law also requires the supplier of these standard terms to explain the meaning of these provisions upon request of the consumer.<sup>323</sup>

#### 4.1.5. *The Enforceability of U.S. Disclaimer Clauses in China*

Until recently, no Chinese court or regulator has weighed in on the enforceability of American-style terms of use that eliminate implied warranties. The twenty-five Chinese social networking platforms rarely used the word “warranty” and almost never disclaimed warranties because these provisions are not enforceable. *Guo Li v. Microsoft Corp.*, decided by Judge Jiangyin in Beijing Intermediate People’s Court in 2011, is an emblematic case study of how an American company’s one-sided warranty disclaimer was invalidated by a Chinese court.<sup>324</sup> In *Guo Li*, a Chinese customer filed suit against Microsoft, challenging several clauses<sup>325</sup> of their standard licensing agreement, which disclaimed warranties and limited the software publisher’s liability. Clause 26 of Microsoft’s licensing agreement provides:

To the maximum extent permitted by applicable law, Microsoft and its suppliers provide to you the OS Component (“OS Component”), and any (if any) support services related

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<sup>321</sup> See Ron Cai & Victoria Ding, *Amendments to the Law on the Protection of the Rights and Interests of Consumers to Take Effect on March 15, 2014*, Davis, Wright & Tremaine Advisory (Jan. 7, 2014), <http://www.dwt.com/Amendments-to-the-Law-on-the-Protection-of-the-Rights-and-Interests-of-Consumers-to-Take-Effect-on-March-15-2014-01-07-2014/> (discussing Article 10 of the amendments to the Law on the Protection of the Rights and Interests of Consumers to Take Effect on March 15, 2015).

<sup>322</sup> PRC Contract Law, art. 39.

<sup>323</sup> *Id.*

<sup>324</sup> *Guo Li Su Microsoft* (郭力诉微软格式合同无效案) (*Guo Li v. Microsoft*), (Beijing Interm. People’s Ct. June 20, 2011), Pku.cn, available at <http://pku-law.cn/CLL.C.387520> (China).

<sup>325</sup> Note that the Jiangyin court renumbered the disputed clauses contained in the Microsoft licensing agreement and incorporated these clauses in her judicial opinion. The numbering of the clauses in this case refers to numbers used in the judicial opinion. The original Microsoft license agreement is not accessible.

to the OS Components ("Support Services") as is and with all faults; and Microsoft and its suppliers hereby disclaim with respect to the OS Components and Support Services all warranties and conditions, whether express, implied or statutory, including, but not limited to any (if any) warranties or conditions of or related to: title, non-infringement, merchantability, fitness for particular purpose, lack of viruses, accuracy or completeness of responses, results, lack of negligence or lack of workmanlike effort, quiet enjoyment, quiet possession and correspondence to description. The entire risk arising out of use or performance of the OS Components and any Support Services remains with you.<sup>326</sup>

Microsoft's clause is a typical American-style disclaimer of warranties employed by the U.S. social media providers in our sample. American courts routinely uphold these disclaimers, so long as the seller follows the methodology of U.C.C. Section 2-316.<sup>327</sup> Nevertheless, the Chinese court refused to enforce Microsoft's standard disclaimer of warranty clause because it disclaimed the title of the software and the implied warranties of merchantability in violation of the PRC Contract Law purchase and sale provisions.<sup>328</sup> Article 174 of the PRC Contract Law provides: "Any other non-gratuitous contract shall comply with laws containing relevant provisions and in the absence of such provisions, shall be handled with reference to the provisions governing purchase and sale contracts."<sup>329</sup>

Under provisions governing the purchase and sale agreement, the seller must warrant that there is no impairment to the goods and the ownership of the goods.<sup>330</sup> The *Guo Li* court ruled that the licen-

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<sup>326</sup> Microsoft Windows XP Licensing Agreement, noted in *Guo Li Su Microsoft* (郭力诉微软格式合同无效案) (*Guo Li v. Microsoft*), (Beijing Interm. People's Ct. June 20, 2011), Pku.cn, available at <http://pkulaw.cn/CLI.C.387520> (Pkulaw.cn) (China).

<sup>327</sup> See U.C.C. §2-316 (stating the conditions for the exclusion or modification of warranties).

<sup>328</sup> *Guo Li Su Microsoft* (郭力诉微软格式合同无效案) (*Guo Li v. Microsoft*); see also U.C.C. §2-316.

<sup>329</sup> PRC Contract Law art. 174.

<sup>330</sup> See PRC Contract Law, art. 150 (stating that seller should "guarantee that no third party shall claim rights against the buyer" over the goods delivered unless "the law provides otherwise"); see also PRC Contract Law art. 62, cl. 1 (stating that "in cases of unclear quality requirements, the contract shall be performed in accordance with State standards or trade standards . . .").

sor of the software must warrant the implied warranty of merchantability of the software and that it is in the lawful position to license the software.<sup>331</sup> The Chinese intermediate court invalidated Clause 26, which attempted to disclaim both warranties of merchantability and authority.<sup>332</sup> Microsoft appealed and the Beijing High People's Court upheld the decision in June 2013.<sup>333</sup>

Currently, no specific Chinese statute addresses warranty disclaimers employed by social media.<sup>334</sup> Nevertheless, it is likely that Chinese courts will extend the *Guo Li* case to social media contracts. Under this decision, U.S. style warranty disclaimers, routinely included in social media terms of use, violate PRC contract law.<sup>335</sup> Chinese courts could also strike down American warranty disclaimers because these standard forms impose greater burdens on the other party and therefore violate Article 40 of PRC Contract Law and Article 24 of the PRC Consumer Protection Law.<sup>336</sup>

The *Guo Li* case is the first successful PRC challenge to mass-market style software license agreements, and is a template for which social media terms of use are enforceable and which are presumptively unenforceable.<sup>337</sup> This case is emblematic in spelling out guideposts on how Chinese courts are likely to treat social media terms of use that contain one-sided terms favoring the dominant party.<sup>338</sup>

In the post-*Guo Li* period, it is likely that users or the Chinese consumer associations will challenge one-sided provisions that, in effect, divest the social media customer of any meaningful remedy when the provider defaults or infringes rights. American companies targeting the Chinese marketplace must comply with mandatory consumer law provisions or risk regulatory and court sanctions.

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<sup>331</sup> *Guo Li Su Microsoft* ( 郭力诉微软格式合同无效案 ) (*Guo Li v. Microsoft*).

<sup>332</sup> *Id.*

<sup>333</sup> Judge Jiangyin, *The Enforceability of Shrinkwrap License Agreement*, SINABLOG, [http://blog.sina.com.cn/s/blog\\_e12c8cce0101abb3.html](http://blog.sina.com.cn/s/blog_e12c8cce0101abb3.html) (last visited Feb. 24, 2015).

<sup>334</sup> See generally PRC Contract Law; see also 2014 PRC Consumer Protection Law.

<sup>335</sup> The 2011 *Guo Li* case was decided before the 2013 amendments to China's consumer statute went into effect. The amended Chinese consumer law strengthens rights and remedies for all consumers in all contracts, making it even more likely that social media disclaimers will be invalidated.

<sup>336</sup> See previous discussion in the "Chinese Antithetical Approach to Disclaimers" section.

<sup>337</sup> See generally *Guo Li Su Microsoft* ( 郭力诉微软格式合同无效案 ) (*Guo Li v. Microsoft*).

<sup>338</sup> *Id.*

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American social media providers must not mechanically incorporate one-sided choice of forum clauses, limitations of liability, caps on damages, warranty disclaimers, or other U.S. style clauses in their agreements that unduly benefit the licensor.

#### 4.2. Caps on Damages Compared: U.S. vs. China

##### 4.2.1. Chinese Terms of Use & Capped Damages

Ten of the twenty-five Chinese social media sites (40%) disclaimed at least one category of damages (*i.e.*, direct damages, consequential damages, punitive damages). Sixty percent of the Chinese sites did not attempt to limit their liability in their terms of use agreement. No Chinese social network capped damages at a nominal amount such as fees paid to the site.

In contrast, twenty-four out of the twenty-five top U.S. social media sites attempted to limit liability in their terms of use. Social media providers capped all categories including direct, indirect, consequential, special, and punitive damages. Both Facebook and Twitter capped damages at no greater than \$100 or fees paid for a given period. Facebook, for example, disclaims all express or implied warranties for its services and caps damages at \$100 or the amount that the customer paid the SNS in the past twelve months:

OUR AGGREGATE LIABILITY ARISING OUT OF THIS STATEMENT OR FACEBOOK WILL NOT EXCEED THE GREATER OF ONE HUNDRED DOLLARS (\$100) OR THE AMOUNT YOU HAVE PAID US IN THE PAST TWELVE MONTHS. APPLICABLE LAW MAY NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. IN SUCH CASES, FACEBOOK'S LIABILITY WILL BE LIMITED TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW.<sup>339</sup>

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<sup>339</sup> *Statement of Rights and Responsibilities*, FACEBOOK (Nov. 15, 2013), <https://www.facebook.com/legal/terms>.

Similarly, Snapchat's limitation of liability clause states that "in no event will Snapchat's aggregate liability for all claims relating to the services exceed the greater of \$100 usd or the amount you paid Snapchat, if any, in the last 12 months."<sup>340</sup>

Five of the U.S. social media providers capped total user recovery at the fees paid to the social network during a fixed period, such as the last six months or a year. Forty percent of the American social media providers eliminated all damages categories, which has the effect of creating a cap of zero. One social media provider in the U.S. social media sample limited damages to \$10 or less. Seven U.S. social media providers limited user recovery to a nominal amount that ranged from \$11 to \$100. Two providers (8%) capped damages between \$500 and \$1,000. Only seven of the top twenty-five Chinese providers (28%) attempted to eliminate categories of damages in their terms of use. Only one Chinese social media provider in the top twenty-five sites (4%) limited damages to a particular dollar amount (\$10 or less).

#### 4.2.2. *The Enforceability of U.S. Capped Damages Clause in China*

In 2013, the Beijing High People's Court upheld Judge Jiangyin's decision, invalidating a standard limitation of liability clause in Microsoft's license agreement.<sup>341</sup> The Jiangyin court refused to enforce Microsoft's standard limitation of liability clause because it violated PRC Contract Law, Article 53, and Article 24 of the Law of People's Republic of China on Protection of Consumer Rights and Interest.<sup>342</sup> In the *Guo Li* case, the court invalidated Microsoft's Clause 20,<sup>343</sup> which stated:

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<sup>340</sup> *Terms of Service*, SNAPCHAT (Oct. 28, 2015), <https://www.snapchat.com/terms>.

<sup>341</sup> Judge Jiangyin, *The Enforceability of Shrinkwrap License Agreement*, SINA BLOG, [http://blog.sina.com.cn/s/blog\\_e12c8cce0101abb3.html](http://blog.sina.com.cn/s/blog_e12c8cce0101abb3.html) (last visited Feb. 24, 2015).

<sup>342</sup> *Guo Li Su Microsoft* (郭力诉微软格式合同无效案) (*Guo Li v. Microsoft*), Note that, the 2011 *Guo Li* case was decided before the 2013 amendments to China's consumer statute went into effect. The amended Chinese consumer law strengthens rights and remedies for all consumers in all contracts and renumbered article 24 as article 26 in the amended Chinese consumer protection law. Cf. PRC Consumer Protection Law (1994), art. 24 and PRC Consumer Protection Law (2014), art. 26.

<sup>343</sup> Note that, the Jiangyin court renumbered the disputed clauses contained in the Microsoft licensing agreement and incorporated these clauses in her judicial

To the maximum extent permitted by applicable law, except the warranty clauses, in no event shall Microsoft be liable for damages arising out of or in any way related to the use of or inability to use the software, including, but not limited to damages for loss of profits or confidential or other information, for business interruption, for any other pecuniary or other loss whatsoever, even if Microsoft has been advised of the possibility of such damages. Under all conditions, the liabilities of Microsoft hereunder shall be limited to the amount actually paid by you for the Software. The foregoing limitations shall not be applicable to the items not exemptible under applicable law.<sup>344</sup>

Article 53 of the PRC Contract Law invalidates the provisions in any contract that (1) excludes the dominant party's liability for personal injury caused to a licensee; and (2) "[e]xcludes one party's liability for property loss caused to the other party by its intentional misconduct or gross negligence."<sup>345</sup>

The PRC court reasoned that Microsoft violated Article 53 of the PRC Contract Law by limiting its liability even when the provider has caused damages or injury by gross negligence.<sup>346</sup> The Chinese court further reasoned that if Microsoft knew that the software would cause loss to the customer, the company was in the best position to make reasonable efforts to avoid such losses or damages.<sup>347</sup> Furthermore, the court invalidated a functionally similar clause.<sup>348</sup> In addition, the court held that the clause violated Article 24 of the Law of People's Republic of China on Protection of Consumer

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opinion. The numbering of the clauses in this case refers numbers used in the judicial opinion. The original Microsoft license agreement is not accessible.

<sup>344</sup> *Microsoft Windows XP Licensing Agreement*, noted in Guo Li Su Microsoft (郭力诉微软格式合同无效案 (*Guo Li v. Microsoft*)), (Beijing Interm. People's Ct. June 20, 2011)(China), Pku.cn, available at <http://pkulaw.cn/CLIC.387520> (Pkulaw.cn). (English Translation).

<sup>345</sup> PRC Contract Law, art. 53.

<sup>346</sup> Guo Li Su Microsoft (郭力诉微软格式合同无效案) (*Guo Li v. Microsoft*).

<sup>347</sup> *Id.*

<sup>348</sup> In Clause 27 of the Microsoft Licensing Agreement, Microsoft or other providers will not be responsible for any liabilities that arise from the function or the dysfunction of the "OS component" or supporting services, including but not limited to, loss of profit, privacy, personal injury, or any liability that arises due to failure to exercise reasonable care or good faith, even if Microsoft or other providers has been advised the possibilities of such damages. The court refused to enforce this provision.



Rights and Interests by limiting the company's liability to the customer purchase price.<sup>349</sup> Under Article 24, "business operators may not, through format contracts, notices, announcements, entrance hall bulletins and so on, impose unfair or unreasonable rules on consumers or reduce or escape their civil liability for their infringement of the legitimate rights and interests of consumers . . . (such content) shall be invalid."<sup>350</sup>

The *Guo Li* court concluded that the damage caused by the foreseeable risk of the software might be far higher than the software purchase price.<sup>351</sup> By limiting damages, Microsoft reduced its civil liability for its infringement of the legitimate rights and interests of consumer, and therefore violated the law.<sup>352</sup> Microsoft argued that the clause did not limit the whole liability, but only limited the liability to the maximum extent permitted by the law. The court did not accept this argument and held the whole clause to be invalid.<sup>353</sup> The court also held that clause 28 violated Article 24 of the Law of People's Republic of China on Consumer Rights and Interests, because it capped the liability of the defendant to a maximum of \$5.<sup>354</sup> This monumental case sent a signal that Chinese courts will be predisposed to police American-style rights foreclosure schemes that cap damages to a nominal amount or fees paid.

#### 4.3. Mandatory Arbitration: *China vs. U.S.*

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<sup>349</sup> Guo Li Su Microsoft ( 郭力诉微软格式合同无效案 ) (*Guo Li v. Microsoft*).

<sup>350</sup> Law of the People's Republic of China on Protection of Consumer Rights and Interests (1993), art. 24, available at <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn174en.pdf> (last visited Feb. 7, 2015).

<sup>351</sup> Guo Li Su Microsoft ( 郭力诉微软格式合同无效案 ) (*Guo Li v. Microsoft*).

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Microsoft Windows XP Licensing Agreement*, noted in Guo Li Su Microsoft. ( 郭力诉微软格式合同无效案 ) (*Guo Li v. Microsoft*), (Beijing Interim People's Ct. June 20, 2011) (China), Pku.cn, available at <http://pkulaw.cn/CLIC.387520> (Pkulaw.cn) (noting that in Clause 28 of the licensing agreement, Microsoft provided that any damage suffered by the licensee will be compensated to the actual damage or 5 dollars, whichever is higher. This limitation of liability clause is applied to the maximum extent permitted by applicable law, even if the compensation failed its essential purpose).

Social media providers in China seldom impose forced arbitration clauses on their users. Only five of the twenty-five Chinese social media providers specified that disputes were to be decided by arbitration (20%), and these clauses were often cryptic and unhelpful. No Chinese arbitration clause provided an explanation of arbitration or gave a link to obtain information on the provider. In three of the five Chinese terms of use imposing arbitration, the arbitral provider was specified. Social media providers in our sample chose SIAC, the Beijing Arbitration Commission, and the China International Economic and Trade Arbitration Commission. The chief business-to-business arbitral provider is the China International Economic and Trade Arbitration Commission ("CIETAC").<sup>355</sup> CIETAC is one of the busiest arbitration institutions in the world, with an average of 1,300 cases handled annually.<sup>356</sup> Nevertheless, CIETAC does not have specialized rules for consumer arbitration, let alone rules for social media disputes.

Chinese arbitration clauses are placed, on average, 4,018 words within the interior of the boilerplate (Median=4,126), much like their U.S. counterparts. Chinese social media providers afford users little information about arbitration. The mean arbitration clause is only 85 words in length (median=66 words). American arbitration clauses have a median of 302 words. None of the five Chinese media providers imposing arbitration mentioned the cost of arbitration or how costs would be divided between the provider and the user. American social media providers in our sample did not provide this information either.

WeChat International, a platform that targets a globalized customer base, drafted the most comprehensive arbitral clause:

Any dispute, controversy or claim (whether in contract, tort or otherwise) arising out of, relating to, or in connection with these Terms, including their existence, validity, interpretation, performance, breach or termination, will be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre under the Hong Kong

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<sup>355</sup> GUIDE TO INTERNATIONAL ARBITRATION 15, LATHAM & WATKINS (2014), available at <http://www.lw.com/admin/Upload/Documents/Guide-to-International-Arbitration-May-2014.pdf>.

<sup>356</sup> See *About Us*, CIETAC, <http://www.cietac.org/index.cms> (last visited Feb. 12, 2015) (stating that CIETAC "independently and impartially resolves economic and trade disputes by means of arbitration.").

International Arbitration Centre Administered Arbitration rules in force when the Notice of Arbitration is submitted. The seat of the arbitration will be Hong Kong. There will be one arbitrator only. The arbitration proceedings will be conducted in English.<sup>357</sup>

The former Consumer Protection Law in article 34, clause 4, addresses Chinese consumer arbitration.<sup>358</sup> The validation of consumer arbitration was also recognized in the 2014 amended Consumer Protection Law article 39, clause 4.<sup>359</sup> Jiayuan, a Chinese dating SNS, incorporates an arbitration clause in its terms of service, which states:

The commencement of the registration provisions, performance, interpretation and dispute settlement are applicable existing laws of the PRC, the dispute shall be referred to the Beijing Arbitration Commission, and the arbitration award is final. The registration provisions due to conflict with the existing laws of the PRC resulting from ineffective part of the terms does not affect the validity of the remaining provisions.<sup>360</sup>

Forty percent of the top twenty-five U.S. social media providers coupled caps with mandatory arbitration clauses. When American social media providers impose a hard cap on damages that is less than the cost of arbitration or litigation, the effect is to divest the consumer of any meaningful remedy.<sup>361</sup> Of the ten social media pro-

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<sup>357</sup> *Terms of Service*, WECHAT (last modified Sept. 4, 2014), [http://www.wechat.com/en/service\\_terms.html](http://www.wechat.com/en/service_terms.html) (last visited Feb. 19, 2015).

<sup>358</sup> PRC Consumer Protection Law (1994), art. 34 cl. 4 and PRC Consumer Protection Law (2014), art. 39, cl. 4.

<sup>359</sup> PRC Consumer Protection Law (2014), art. 39, cl. 4.

<sup>360</sup> *Terms of Registration*, JIAYUAN, <http://reg.jiayuan.com/clause.php> (last visited Feb. 12, 2015).

<sup>361</sup> LinkedIn's Limitation of Liability clause states:

"LIMITATION OF LIABILITY. SOME COUNTRIES DO NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY IN CONTRACTS WITH CONSUMERS AND AS A RESULT THE CONTENTS OF THIS SECTION MAY NOT APPLY TO YOU. Neither LinkedIn nor any of our subsidiaries, affiliated companies, suppliers, employees, shareholders, or directors ("LinkedIn Affiliates") shall be cumulatively liable for (a) any damages in excess of five times the most recent monthly fee that you paid for a Premium Service, if any, or US \$100, whichever amount is greater, or

viders mandating arbitration, seven also imposed an anti-class action waiver: Skype, Academia, Pinterest, FriendFinder, Match.com, Hi5, and Flixster. Twice as many U.S. social media sites mandated arbitration as their Chinese counterparts (5 of 25, or 20%). None of the Chinese social media providers attempted to eliminate class action lawsuits.

China's recent amendments to its consumer protection statute, which give provincial China Consumer Associations the right to bring public interest lawsuits, have been employed to challenge unfair or deceptive business practices.<sup>362</sup> On December 30, 2014, nine months after the new law went into effect,<sup>363</sup> the consumers' association from Zhejiang province filed the first consumer protection public interest lawsuit against the Shanghai Railroad Bureau.<sup>364</sup> Zhejiang Consumers' Association submitted a complaint to the Shanghai Railway Transportation Court alleging that Shanghai Railroad Bureau should not require consumers to repurchase their ticket when their tickets have been lost after the consumers registered to purchase the railway ticket with their real name.<sup>365</sup> Zhejiang Consumers' Association is requesting an order from Shanghai Railway

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(b) any special, incidental, indirect, punitive or consequential damages or loss of use, profit, revenue or data to you or any third person arising from your use of the Services, any Platform Applications or any of the content or other materials on, accessed through or downloaded from LinkedIn. This limitation of liability is part of the basis of the bargain between the parties and without it the terms and prices charged would be different. This limitation of liability shall apply regardless of whether (1) you base your claim on contract, tort, statute or any other legal theory, (2) we knew or should have known about the possibility of such damages, or (3) the limited remedies provided in this section fail of their essential purpose; and not apply to any damage that LinkedIn may cause you intentionally or knowingly in violation of this Agreement or applicable law, or as otherwise mandated by applicable law that cannot be disclaimed in this Agreement. These terms may not apply if you have entered into a separate agreement to purchase Premium Services with a separate Limitation of Liability provision that supersedes this section in relation to those Premium Services."

*User Agreement*, LINKEDIN, <http://www.linkedin.com/legal/user-agreement> (last visited Feb. 12, 2015).

<sup>362</sup> 2014 Consumer Protection Law art. 47.

<sup>363</sup> The new consumer protection law became effective March 15, 2014.

<sup>364</sup> Real-name Ticket Lost to be the Replacement Ticket Zhejiang Consumer Protection Committee sued Railway Bureau, FIRENEWS, <http://www.fireinews.com/news-9298493.html> (last visited Feb. 21, 2015).

<sup>365</sup> *Id.*

Transportation Court to enjoin this behavior.<sup>366</sup> In January 9, 2015, the China Consumers' Association at the national level announced their support on its website for the Zhejiang Consumers' Association's use of the rights granted by the amended Consumer Protection Law to protect consumer rights.<sup>367</sup> The threat of similar lawsuits will be a strong incentive for social media providers to include fairer terms for users.

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<sup>366</sup> *Id.*

<sup>367</sup> China Consumers Association, *The National Consumer Protection Association Supports Zhejiang Consumer Association for Initiating Consumer protection public interest litigation*, <http://www.cca.org.cn/zxsd/detail/21389.html> (last visited Feb.14, 2015).

#### 4.4. Contract Formation Methodologies Compared

Chinese social media providers have adopted U.S.-style contract formation methodologies, but Chinese social media sites are less likely than top American social media sites to incorporate a browse-wrap agreement in their terms of use. Thirty-six percent of the top twenty-five Chinese media sites specify a browsewrap type agreement as opposed to eighty-four percent of the U.S. social media sites (21 of 25). Sixty percent of the Chinese providers (15 of 25) incorporate a rolling contract provision, reserving the right to amend the agreement upon notice to the user. Seventeen of the twenty-five American providers (68%) employ a rolling contract provision. Chinese social media providers have declined to adopt rights foreclosure clauses, in large part, because of mandatory Chinese consumer law prohibitions.

#### 4.5. Consumer Protection Compared: China versus the United States

The overwhelming finding from the first section of Part III is that Chinese terms of use are more consumer-friendly. However, the recent amendments to China's consumer law may be only the first step toward improving the rights of mass-market license agreements and other consumer contracts in China. In the United States, consumer law is fragmented and sectorial while China's consumer law provides comprehensive consumer protection for all contracts. "On October 25, 2013, the Standing Committee of the National People's Congress passed an amendment to the PRC Law on the Protection of Consumer Rights and Interests, effective March 15, 2014."<sup>368</sup>

China's amended consumer statute includes "increased compensation standards and penalties for violations; expanded liability for businesses involved in false advertising; the development of e-commerce regulations; and the creation of consumer privacy protection standards."<sup>369</sup> Article 47 of the amended Consumer Protection Law provides for government-sponsored public interest lawsuits on

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<sup>368</sup> Congressional-Executive Commission on China, *Amendments to Consumer Protection Law Allows for Public Interest Lawsuits with Limitations*, (Jan. 14, 2014), <http://www.cecc.gov/publications/commission-analysis/amendments-to-consumer-protection-law-allows-for-public-interest> (last visited Feb. 28, 2015).

<sup>369</sup> *Id.*

behalf of consumers in cases when “the rights and interests of a large number of consumers have been infringed upon.”<sup>370</sup> The *Guo Li* court’s decision also suggests that Chinese consumer regulators and courts will be inclined to police American foreclosure clauses in social media boilerplate. China’s consumer laws-in-the-books appear to regulate standard form contracting providing users with comprehensive protection. Further study will be necessary of the Chinese consumer law-in-action to determine if government-sanctioned class actions are effectively policing one-sided mass-market license agreements.

#### 4.6. Chinese Terms Are Likely To Be Troublesome in U.S. Courts

##### 4.6.1. Real-Name Registration in China

In February 2015, the PRC National Internet and Telecommunications Administration enacted a regulation that requires users to register for blogs, instant messaging, and other social media services with their real names.<sup>371</sup> Users can choose a “pen name” as their user name.<sup>372</sup> Microblogging and messaging service providers are required to verify users’ identities.<sup>373</sup> This regulation extended previous regulations and social media site requirements. On December 15, 2011, the Beijing Municipal Government had issued “Microblogging rules which require Microblog users to register their identity with service providers.”<sup>374</sup> Chinese consumers “must present an ID

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<sup>370</sup> *Id.*

<sup>371</sup> Josh Chin, *China is Requiring People to Register Real Names for Some Internet Services*, WALL ST. J. (last modified Feb. 4, 2015), <http://www.wsj.com/articles/china-to-enforce-real-name-registration-for-internet-users-1423033973> (last visited Feb. 11, 2015).

<sup>372</sup> See *National Network Information Office Issued “Account Ten” Specification Screen Name and Avatar*, XINHUA NEWS AGENCY (Apr. 2, 2011), available at <http://tech.qq.com/a/20150204/026840.htm> (last visited Feb. 15, 2015).

<sup>373</sup> *Id.*

<sup>374</sup> *Sina Announces Issuance of New Rules on Microblogging by the Beijing Municipal Government*, PR NEWSWIRE-ASIA (Dec. 16, 2011), <http://www.prnewswire.com/news-releases/sina-announces-issuance-of-new-rules-on-microblogging-by-the-beijing-municipal-government-135729318.html> (last visited Feb. 12, 2015).

card or a mobile phone number to use social media accounts, making it relatively easy to trace messages back to the source.”<sup>375</sup> Under the Microblog Rules, users are required to “disclose their real identity information only to the microblogging service provider and may still use a pen name to reflect their account name on the front end.”<sup>376</sup>

In 2012, Sina Weibo required users to register with their real names and Chinese ID numbers or a mobile phone number.<sup>377</sup> Sina Weibo has not fully implemented the real name registration process, despite being required to do so under the “Microblog Rules.”<sup>378</sup> Sina Weibo further disclosed to the U.S. Securities and Exchange Commission that they have made “significant efforts to comply with the verification requirements,” but they have been unable to verify the

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<sup>375</sup> Leslie A. Pappas, *Attorneys Say Use of Social Media Evidence in Chinese Courts is Rising*, BLOOMBERG, BNA, SOC. MEDIA AND THE L. & POL'Y REP. (Oct. 30, 2014), <http://www.bna.com/attorneys-say-social-n17179910756/>.

<sup>376</sup> Steven Millward, *Sina Admits to Investors It Has Failed to Implement Real Name Policy on Weibo* (Apr. 29, 2012), <https://www.techinasia.com/sina-admits-real-name-not-implemented-weibo/> (last visited Feb. 12, 2015).

<sup>377</sup> Steven Millward, *Real Name Checks on Weibo Won't Come Cheap for Sina, Tencent*, TECHINASIA (Jan. 5, 2012), <https://www.techinasia.com/weibo-real-name-check-fee/>.

<sup>378</sup> Millward, *Supra* note 376 (stating, “We are required to, but have not, verified the identities of all of our users who post on Weibo, and our noncompliance exposes us to potentially severe penalty by the Chinese government . . . . On December 16, 2011, the Beijing Municipal Government issued the Rules on the Administration of Microblog Development, or the “Microblog Rules,” which became effective on the same day. Under the Microblog Rules, users who post publicly on microblogs are required to disclose their real identity information to the microblogging service provider and may still use pen names to reflect their account names on the front end. Microblogging service providers are required to verify the identities of their users. In addition, microblogging service providers based in Beijing are required to verify the identities of all of their users by March 16, 2012, including existing users who post publicly on their websites. The user identity verification requirements have deterred new users from completing their registrations on Weibo, and a significant portion of registrations with user identity information provided were rejected because they do not match the Chinese government database. We have made significant efforts to comply with the verification requirements. However, for reasons including existing user behaviors, the nature of the microblogging product and the lack of clarity on specific implementation procedures, we have not been able to verify the identities of all of the users who post content publicly on Weibo. While the Microblog Rules are not clear regarding the type and extent of penalty that may be imposed on non-compliant microblogging service providers, we are potentially liable for our noncompliance and may be subject to penalties including the deactivation of certain features on Weibo, termination of Weibo operations or other penalties imposed by the Chinese government. Any of the above actions may have a material and adverse impact on our share price.”) (emphasis in original).



identities of all of the users for a variety of reasons, including “existing user behaviors, the nature of microblogging product and the lack of clarity on specific implementation procedures.”<sup>379</sup>

On August 7, 2014, China’s state Internet Information Office issued a regulation on instant messaging apps, which also requires real name registration similar to the “Microblogging Rules.”<sup>380</sup> To date, it is unclear when the real name registration will be fully implemented by social media providers. Jiayuan requires users to provide sufficient information so they can identify users in their privacy policy:

(1) When you register for a Jiayuan account, or other Jiayuan products or services, visit Jiayuan website, or participate in any form of membership activities, Jiayuan collects your personally identifiable information. Jiayuan also collects personally identifiable information from partners.

(2) When the user registration Jiayuan account, we will ask you for your name, nickname, email address, birth date, gender, occupation, industry, personal income and a series of personal information successfully registered as long as you Jiayuan and login server, we will be able to identify you.

(3 ) Jiayuan will automatically receive and record information that your browser and the server logs, including but not limited to, your IP address, online, wireless information and other information. Jiayuan such information will be used: to improve web content to provide you meet your needs or to inform you of the latest products of a product, activity, activity information.<sup>381</sup>

Tencent QQ also emphasizes that registrants must disclose their identity:

You may need to fill in necessary information when register or use the Services. If there are mandatory requirements in laws and regulations, you need to fill out this information,

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<sup>379</sup> *China Issues Regulations on Instant Messaging Apps*, CRIENGLISH, <http://english.cri.cn/12394/2014/08/07/2941s839456.htm> (Aug. 7, 2014) (last visited Feb. 22, 2015).

<sup>380</sup> Josh Rudolph, *China Imposes New Restrictions on Instant Messaging*, CHINA DIG. TIMES (Aug. 7, 2014, 5:56 PM), <http://chinadigitaltimes.net/2014/08/china-imposes-new-restrictions-instant-messaging/> (last visited Feb. 11, 2015).

<sup>381</sup> *Privacy Policy*, JIAYUAN, <http://www.jiayuan.com/bottom/private.html>.

such as your identity. If the information you filled out is incomplete, you cannot use the Service or maybe restricted in using this Service.<sup>382</sup>

In the United States, social media services vary significantly in their policies about allowing persons to register with a pseudonym or false information. U.S. courts have extended the constitutional right to speak anonymously to online postings.<sup>383</sup> Facebook, by far the largest American social media platform, prohibits users from using false information in their registration and Facebook users are required to provide their "real names and information."<sup>384</sup> However, with the recent rise of applications that enable users to anonymously post publicly, hidden identities in social networking is one of the fastest growing trends in the United States.<sup>385</sup>

#### 4.6.2. Chinese User Conduct Rules

The PRC government has promulgated detailed regulations proscribing the use of social media to subvert social order and community harmony. The Beijing Municipal Law on microblogging enacted in 2011, for example, specifically addresses what conduct on social media violates national security interests.<sup>386</sup> This language

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<sup>382</sup> *Terms of Use*, TENCENT, at §3.2; see also, §3.3 ("In general, you can always browse, modify the information they submitted, but for security and identification ( e.g. number Ombudsman Service ) to consider, you may not modify the initial registration information provided during registration and other authentication information.") <http://www.qq.com/contract.shtml> (last visited Feb. 11, 2015).

<sup>383</sup> See e.g., *Doe v. 2the Mart.com, Inc.*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001).

<sup>384</sup> *Statements of Rights and Responsibilities*, FACEBOOK, [https://www.facebook.com/note.php?note\\_id=183538190300](https://www.facebook.com/note.php?note_id=183538190300) (last visited Feb. 1, 2015).

<sup>385</sup> Sarah Perez, *Few Winners in Anonymous Social Networking, and Secret's Not One of Them*, TECHCRUNCH (Dec. 18, 2014), <http://techcrunch.com/2014/12/18/few-winners-in-anonymous-social-networking-and-secrets-not-one-of-them/> (last visited Feb. 2, 2015).

<sup>386</sup> The Beijing Municipal People's Government Press and Publications Office, Beijing Municipal Public Security Bureau, Beijing Municipal Communications Management Bureau and Beijing Internet Information Office have formulated "[s]ome Beijing Municipal Provisions on Microblog Development and Management", which were promulgated on 16 December 2011, and took effect on the day of promulgation, *Some Beijing Municipal Provisions on Microblog Development and Management*, CHINA COPYRIGHT AND MEDIA (Dec. 16, 2011), <https://chinacopy-rightandmedia.wordpress.com/2011/12/16/some-beijing-municipal-provisions-on-microblog-development-and-management/#comments> (last visited Feb. 10,

was prefigured in a 1997 PRC computer law statute<sup>387</sup> and likely evolved from a 1994 computer law statute.<sup>388</sup> Article 1 of the 2011 statute states:

In order to standardize microblog service development and management, safeguard network dissemination order, guarantee information safety, guarantee the lawful rights and interests of Internet information service work units and microblog users, satisfy the public's requirements concerning Internet information and stimulate the healthy and orderly development of the Internet, according to laws, regulations and rules such as the "Telecommunications Regulations of

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2015).

<sup>387</sup> Measures for Security Protection Administration of the International Networking of Computer Information Networks" that became effective in the PRC in 1997. Article 5 reproduced below has almost identical chapter to Article 10 of the 2011 Beijing regulation.

No unit or individual shall use the international networking to produce, duplicate, search and disseminate the following information:

- (1) Information that instigates the resistance and disruption of the implementation of the Constitution, laws and administrative regulations;
- (2) Information that instigates the subversion of the state political power and overthrow of the socialist system;
- (3) information that instigates the splitting up of the country and sabotage of national unity;
- (4) information that instigates hatred and discrimination among nationalities and sabotages solidarity among nationalities;
- (5) information that fabricates or distorts facts, spreads rumours and disrupts social order;
- (6) information that propagates feudalistic superstitions, obscenity, pornography, gambling, violence, murder and terror and instigates crimes;
- (7) information that openly insults others or fabricates facts to slander others;
- (8) information that damages the reputation of state organs; and
- (9) other information that violates the Constitution, laws and administrative regulations.

"Measures for Security Protection Administration of the International Networking of Computer Information Networks" that became effective in the PRC in 1997, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=182465](http://www.wipo.int/wipolex/en/text.jsp?file_id=182465) (last visited Feb. 5, 2015).

<sup>388</sup> Laws of the People's Republic of China, Regulations of the People's Republic of China for Safety Protection of Computer Information Systems (promulgated by Decree No. 147 of the State Council of the People's Republic of China, Feb. 18, 1994, effective in 1994), art. 1-31, 1994 P.R.C. LAWS 147 (China)).

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the People's Republic of China", the "Internet Information Service Management Rules," etc., and integrating the real situation of this municipality, these Provisions are formulated.<sup>389</sup>

Article 10 provides specific guidance on what activities are considered antithetical to national security and the social order:

No organization or individual may unlawfully use microblogs to produce, reproduce, publish or disseminate information having the following content:

- (1) content violating the basic principles determined in the Constitution;
- (2) content endangering national security, divulging State secrets, subverting the national regime or destroying national unity;
- (3) content harming State honour or interest;
- (4) content inciting ethnic hatred or ethnic discrimination, destroying ethnic unity;
- (5) content destroying State religious policies, propagating heresy and feudal superstitions;
- (6) content disseminating rumours, disordering social order, destroying social stability;
- (7) content disseminating obscenity, pornography, gambling, violence, terror or instigating crime;
- (8) content insulting or slandering others, violating others' lawful rights and interests;
- (9) inciting illegal assemblies, associations, demonstrations, marches, mobs or disordering social order;
- (10) content using the name of illegal non-governmental organizations;
- (11) other content prohibited by laws and administrative regulations.<sup>390</sup>

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<sup>389</sup> *Some Beijing Municipal Provisions on Microblog Development and Management*, art. 1, CHINA COPYRIGHT AND MEDIA (Dec. 16, 2011).

<sup>390</sup> *Id.* at art. 10.

All but a few Chinese social media terms of use incorporate clauses in their terms of service that warn users not to undermine “national security and unity” as well as to avoid “conduct that undermines social stability, contravenes public order and morals” or engage in other abusive online behavior.<sup>391</sup> Similarly, Sohu’s service agreement lists enabling national security and public interest as reasons for its existence:

In order to protect the network and information security, protect the legitimate rights and interests of citizens, legal persons and other organizations, safeguard national security and public interests, in accordance with national laws and regulations and the relevant provisions of the NPC Standing Committee, Beijing Sohu Internet Information Service Co., Ltd. (hereinafter referred to as "Sohu") to develop and provide network services in accordance with this agreement.<sup>392</sup>

TianYa’s terms of service code of conduct is another example of a Chinese social media platform adopting the PRC regulation against jeopardizing national security or undermining national unity<sup>393</sup> Balancing Chinese norms of social order with free expression will be difficult for American companies. U.S. users, for example, may boycott social media sites that restrict discussions of religion on their Chinese subsidiaries. U.S. religious broadcasters are already protesting what they view as “exclusion from social media.”<sup>394</sup>

Google decided to withdraw from the Chinese mainland market in 2010 and moved its server to Hong Kong where the content will not be blocked,<sup>395</sup> although it is planning a return to Mainland China

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<sup>391</sup> The Beijing Municipal People’s Government Press and Publications Office, Beijing Municipal Public Security Bureau, Beijing Municipal Communications Management Bureau and Beijing Internet Information Office have formulated “Some Beijing Municipal Provisions on Microblog Development and Management,” which are promulgated on 16 December 2011, and take effect on the day of promulgation. *Some Beijing Municipal Provisions on Microblog Development and Management*, CHINA COPYRIGHT AND MEDIA (Dec. 16, 2011).

<sup>392</sup> *Sohu Service Agreement*, SOHU WEIBO, <http://passport.sohu.com/web/serviceitem.jsp> (English translations on file with authors) (last visited Feb. 7, 2015).

<sup>393</sup> *User Registration Agreement*, TIANYA at §4.2, <http://service.tianya.cn/guize/regist.do> (English Translation file with authors) (last visited Feb. 7, 2015).

<sup>394</sup> *Religious Broadcasters Protest Exclusion from Social Media*, ASSOCIATED PRESS (Feb. 21, 2012) <http://archive.11alive.com/news/local/story.aspx?storyid=228917>.

<sup>395</sup> Tim Shi, *Google Withdraws From China*, STAN. DAILY (April 9, 2010),

in 2015 with an Android app store to install “on new smartphones made for the Chinese market that run on Google’s licensed version of Android.”<sup>396</sup> LinkedIn, in contrast, agreed to “compromise on the free expression” on its site in China and was rewarded by being unblocked in 2014.<sup>397</sup> LinkedIn's capitulation to Chinese governmental restrictions illustrates the reality that companies operating in foreign countries with radically different traditions must comply with local law.<sup>398</sup> A representative for LinkedIn, Hani Durzy, made comments on the opening of this Chinese-language site: “While we strongly support freedom of expression, we recognized that when we launched that we would need to adhere to the requirements of the Chinese of the Chinese government in order to operate in China. So the decision to proceed in China was one that we weighed heavily.”<sup>399</sup>

“If LinkedIn figures out how to navigate the operating environment in China, clearly other companies will try to imitate that,” said Kerry Rice, an Internet analyst at Needham, a brokerage firm.”<sup>400</sup>

#### 4.7. *Globalization of Chinese Social Media: WeChat China vs. WeChat International*

The overwhelming Chinese emphasis on enjoining threats to the social order will inevitably lead to legal clashes with the United States and other Western countries unless the Chinese social media world localizes its terms of use to respect the fundamental right of

<http://www.stanforddaily.com/2010/04/09/google-withdraws-from-china/>  
(last visited Feb. 14, 2015).

<sup>396</sup> Alistari Barr, *Goole Pursuing a Return to China*, WALL ST. J. (Sept. 4, 2015), <http://www.wsj.com/articles/google-negotiates-a-return-to-china-1441408051>  
(last visited Dec. 23, 2015)

<sup>397</sup> Paul Mozur & Vindu Goel, *To Reach China, LinkedIn Plays by Local Rules*, N.Y. TIMES (Oct. 5, 2014), [http://www.nytimes.com/2014/10/06/technology/to-reach-china-linkedin-plays-by-local-rules.html?\\_r=0](http://www.nytimes.com/2014/10/06/technology/to-reach-china-linkedin-plays-by-local-rules.html?_r=0) (last visited Feb. 15, 2015).

<sup>398</sup> See Fahad Saleem, *Facebook Inc. (FB) Dedicated Version for China Coming in 2015*, TECH INSIDER, Dec. 26, 2014, available at <http://www.techinsider.net/facebook-inc-fb-dedicated-version-for-china-coming-in-2015/1120471.html> (last visited Feb. 5, 2015) (announcing a forthcoming version of Facebook for China).

<sup>399</sup> Paul Mozur & Vindu Goel, *To Reach China, LinkedIn Plays by Local Rules*, N.Y. TIMES (Oct. 5, 2014), [http://www.nytimes.com/2014/10/06/technology/to-reach-china-linkedin-plays-by-local-rules.html?\\_r=0](http://www.nytimes.com/2014/10/06/technology/to-reach-china-linkedin-plays-by-local-rules.html?_r=0) (last visited Feb. 15, 2015) (quoting Hani Durzy, a spokesperson for LinkedIn).

<sup>400</sup> *Id.*

free expression. Some Chinese social media websites are already localizing their terms of use in order to tap the international market. WeChat, the world's most popular instant messaging app, owned by Chinese Internet giant Tencent Company, reached 468 million monthly active users in the third quarter of 2014.<sup>401</sup> WeChat is used by 23 percent of active users located around the globe.<sup>402</sup> Statista ranks Facebook Messenger second in popularity after WeChat.<sup>403</sup> WhatsApp, regarded as WeChat's rival, ranks third world-wide, with 18 percent of global active users. WeChat's leading position is largely due to its success in the Chinese market, but WeChat is increasingly targeting international users,<sup>404</sup> reporting 100 million registered user accounts outside China in 2013.<sup>405</sup> WeChat has constructed different terms of services for its Chinese users as opposed to its international users.<sup>406</sup> WeChat's international version applies to users anywhere in the world except China and to all users who are not Chinese citizens.<sup>407</sup>

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<sup>401</sup> See STATISTA, *Number of Monthly Active WeChat Users from 2nd Quarter 2010 to 2nd Quarter 2015 (in Millions)*, available at <http://www.statista.com/statistics/255778/number-of-active-wechat-messenger-accounts/> (last visited Feb. 22, 2015) (reporting statistics on monthly WeChat users).

<sup>402</sup> See STATISTA, *Active Usage Reach of the Most Popular Mobile Messaging Apps Worldwide as of 3rd Quarter 2014*, available at <http://www.statista.com/statistics/324794/mobile-messenger-app-reach/> (last visited Feb. 22, 2015) (reporting statistics on international usage of messaging apps).

<sup>403</sup> *Id.*

<sup>404</sup> See Jason Lim, *WeChat, One of The World's Most Powerful Apps*, FORBES (May 19, 2014), available at <http://www.forbes.com/sites/jlim/2014/05/19/wechat-one-of-the-worlds-most-powerful-apps/> (last visited Feb. 24, 2015) (acknowledging WeChat's efforts to make strategic, exploratory pushes into larger markets abroad).

<sup>405</sup> See Kaylene Hong, *WeChat Passes 100M User Accounts Outside China*, THE NEXT WEB (Aug. 15, 2013), available at <http://thenextweb.com/asia/2013/08/15/whatsapp-rival-wechat-surpasses-100-million-user-accounts-outside-china/> (last visited Feb. 12, 2015) (reporting WeChat's announcement that it surpassed 100 million users outside China).

<sup>406</sup> Compare *Terms of Service*, WEIXIN (CHINA) [http://weixin.qq.com/agreement?lang=zh\\_CN](http://weixin.qq.com/agreement?lang=zh_CN) (last visited Feb. 22, 2015), with *Terms of Service*, WECHAT (INTERNATIONAL), [http://www.wechat.com/en/service\\_terms.html](http://www.wechat.com/en/service_terms.html) (last visited Feb. 22, 2015) (reflecting WeChat international standards for all countries other than China).

<sup>407</sup> See *Terms of Service, Introduction*, WECHAT (INTERNATIONAL), [http://www.wechat.com/en/service\\_terms.html](http://www.wechat.com/en/service_terms.html) ("These Terms apply to you if you are a user of our services anywhere in the world other than the People's Republic of China (and you are not a citizen of the People's Republic of China).").

Table Eleven, below, depicts the differences between the indigenous WeChat terms of use and the terms that target international users. WeChat's international agreement includes American-style rights foreclosure clauses, but does not have social order or national security clauses like their domestic agreement.

*Table Eleven: WeChat International vs. WeChat China Terms of Use*

Terms of Use Clause	WeChat International	WeChat China
<b>Choice of Forum</b>	Binding Arbitration administered by Hong Kong International Arbitration Centre <sup>408</sup>	Litigation in Shenzhen, Nanshan district of Guangdong province of China <sup>409</sup>
<b>Choice of Law</b>	The law of the Hong Kong Special Administrative Region unless the applicable laws and regulations of the user's jurisdiction mandate otherwise <sup>410</sup>	China <sup>411</sup>
<b>Warranty Disclaimers</b>	Total Disclaimer of Express and Implied Warranties except the use of reasonable care. <sup>412</sup>	None

<sup>408</sup> See *Terms of Service, Governing Law and Dispute Resolution*, WECHAT (INTERNATIONAL), [http://www.wechat.com/en/service\\_terms.html](http://www.wechat.com/en/service_terms.html) ("Any dispute, controversy or claim . . . will be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre . . .").

<sup>409</sup> See *Terms of Service*, at § 12.2 & § 12.4, WECHAT (CHINA), [http://weixin.qq.com/cgi-bin/readtemplate?uin=&stype=&promote=&fr=wechat.com&lang=zh\\_CN&ADTAG=&check=false&nav=faq&t=weixin\\_agreement&s=default](http://weixin.qq.com/cgi-bin/readtemplate?uin=&stype=&promote=&fr=wechat.com&lang=zh_CN&ADTAG=&check=false&nav=faq&t=weixin_agreement&s=default).

<sup>410</sup> See *Terms of Service, Governing Law and Dispute Resolution*, WECHAT (INTERNATIONAL), [http://www.wechat.com/en/service\\_terms.html](http://www.wechat.com/en/service_terms.html) ("[T]hese Terms and any dispute or claim arising out of or in connection with these terms will be governed by the law of the Hong Kong Special Administrative Region.").

<sup>411</sup> See *Terms of Service*, at § 12.3, WECHAT (CHINA), [http://weixin.qq.com/cgi-bin/readtemplate?uin=&stype=&promote=&fr=wechat.com&lang=zh\\_CN&ADTAG=&check=false&nav=faq&t=weixin\\_agreement&s=default](http://weixin.qq.com/cgi-bin/readtemplate?uin=&stype=&promote=&fr=wechat.com&lang=zh_CN&ADTAG=&check=false&nav=faq&t=weixin_agreement&s=default).

<sup>412</sup> See *Terms of Service, Warranty and Disclaimer*, WECHAT (INTERNATIONAL).



Terms of Use Clause	WeChat International	WeChat China
<b>Caps on Damages</b>	Capped at \$100. <sup>413</sup>	None
<b>Mandatory Arbitration</b>	Binding Arbitration Before Hong Kong International Arbitration Centre. <sup>414</sup>	None
<b>Class Action Waivers</b>	Yes, Give up right to participate in a class action or class proceeding. <sup>415</sup>	None
<b>Prohibition of User Actions That Endanger National Security</b>	No	National security and social order. <sup>416</sup>
<b>Religious Prohibitions</b>	No	Violate state religion, propagate cults or religious superstition. <sup>417</sup>
<b>Incitement of Ethnic Hatred</b>	No	Ethnic hatred or ethnic discrimination <sup>418</sup>

<sup>413</sup> See *Terms of Service, Liability for WeChat*, WECHAT (INTERNATIONAL), (“[T]he total aggregate liability of us and our affiliate companies for all claims in connection with these terms . . . will be limited to . . . USD100.”).

<sup>414</sup> See *Terms of Service, Governing Law and Dispute Resolution*, WECHAT (INTERNATIONAL), (“any dispute, controversy or claim (whether in contract, tort or otherwise) arising out of, relating to, or in connection with these Terms, including their existence, validity, interpretation, performance, breach or termination, will be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre under the Hong Kong International Arbitration Centre Administered Arbitration Rules in force when the Notice of Arbitration is submitted. The seat of the arbitration will be Hong Kong. There will be one arbitrator only. The arbitration proceedings will be conducted in English.”)

<sup>415</sup> See *Terms of Service, Governing Law and Dispute Resolution*, WECHAT (INTERNATIONAL), [http://www.wechat.com/en/service\\_terms.html](http://www.wechat.com/en/service_terms.html) (“Each of the parties hereto irrevocably waives any and all right to trial by jury or to participate in a class action . . .”).

<sup>416</sup> See *Terms of Service*, at §8.1.2.1(2), WECHAT (CHINA) [http://weixin.qq.com/cgi-bin/readtemplate?uin=&stype=&promote=&fr=wechat.com&lang=zh\\_CN&ADTAG=&check=false&nav=faq&t=weixin\\_agreement&s=default](http://weixin.qq.com/cgi-bin/readtemplate?uin=&stype=&promote=&fr=wechat.com&lang=zh_CN&ADTAG=&check=false&nav=faq&t=weixin_agreement&s=default).

<sup>417</sup> *Id.* at § 8.1.2.1(5).

<sup>418</sup> *Id.* at § 8.1.2.1 (8).

As Table Eleven illustrates, WeChat's international version employs American-style warranty disclaimers and caps total recovery at \$100. These anti-consumer clauses are not included in WeChat's terms of use targeting Chinese consumers.<sup>419</sup> WeChat's strategy of formulating one set of terms for its indigenous market and another for the foreign market is one way to cope with radically different consumer rules. American social media providers need to follow this example since they are already facing legal liability in the Eurozone. As in China, welfarism in contract law in Europe has taken the form of mandatory terms giving the court the power to strike down unbalanced contract terms in social media contracts. The Unfair Contract Terms Directive (UCTD)'s Annex of Unfair Terms: "presumptively invalidates many widely used American-style licensing terms providing disclaimer of warranties, limitation of licensor's liability, limitation of remedies for consumers, unilateral modifications to contract terms and contract acceptance by performance."<sup>420</sup>

All twenty-five of the social media providers in the United States include a choice of forum clause in their terms of use.<sup>421</sup> Courts in the United States generally uphold choice of forum clauses that compel users to appear in the forum chosen by the provider.<sup>422</sup> In the twenty-eight countries of the European Union, however, the Brussels Regulation governing jurisdiction and the recognition and enforcement of judgments in civil and commercial disputes mandates a pro-consumer home forum rule.<sup>423</sup> American companies doing business in the European Union must comply with the Brussels Regulation.

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<sup>419</sup> See *Terms of Service, Warranty and Disclaimer*, WECHAT (INTERNATIONAL), [http://www.wechat.com/en/service\\_terms.html](http://www.wechat.com/en/service_terms.html) (last visited Feb. 12, 2015).

<sup>420</sup> Michael L. Rustad, *GLOBAL INTERNET LAW* (Hornbook Series) 360 (2014).

<sup>421</sup> Fifteen social media providers chose a location in North America, while ten chose an arbitral forum.

<sup>422</sup> See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing a forum selection clause mandating that cruise passengers will litigate in Florida); *Forrest v. Verizon Commc'n, Inc.*, 805 A.2d 1007 (D.C. 2002) (upholding Verizon's forum selection clause because the consumer had adequate notice of the clause and it was not unreasonable); *Koch v. Am. Online, Inc.*, 139 F. Supp. 2d 690, 695-96 (D. Md. 2000) (upholding a choice of forum clause requiring all AOL customers to adjudicate claims in Virginia).

<sup>423</sup> See Council Regulation (EC) No. 44/2001 of 22 Dec. 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2003 O.J. (L 12), 16 Jan. 2001, arts. 15-17 (promulgating mandatory, nonwaivable right of EU consumers to sue in their home jurisdiction).

A French court of appeals recently ruled that a Facebook user is not bound by the provision that requires disputes to be brought exclusively in a state or federal court located in Santa Clara County.<sup>424</sup> “The regional court of appeals ruled that the provision violates Article 48 of the French Code of Civil Procedure, which requires that such a clause be highly visible. The court also found that such a restrictive clause is only valid between businesses.”<sup>425</sup>

In *Union Federale de Consommateurs v. AOL France*, the French court struck down thirty-six clauses in AOL France’s (hereinafter AOL) standard terms of use agreement, and further required the online provider to remove those clauses from their terms within one month. Additionally, the court fined AOL for each day it delayed removing the objectionable clauses.<sup>426</sup> “The French court ruled that AOL had a duty to notify its French customers of the resulting changes to its terms of use and imposed a fine of €30,000 against AOL; ordering the online provider to publish the substantive parts of the court’s judgment on its website and in three national daily newspapers.”<sup>427</sup> American companies such as Apple have already modified many of their licensing agreements for the European consumer marketplace in response “to a 2006 consumer advocate’s complaint that its standard form is unfair.”<sup>428</sup>

These cases are not isolated but reflect a larger trend of courts and consumer authorities outside the United States refusing to enforce American-style foreclosure schemes.<sup>429</sup> German consumer associations have already challenged the standard form contracts of “CompuServe, AOL, and Microsoft: the first one was subject to a default judgment; the other two agreed to a binding cease-and-desist declaration.”<sup>430</sup> American social media providers with choice of forum and arbitration clauses violate the Unfair Contract Terms Di-

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<sup>424</sup> See Sébastien R. v. Société Facebook, Inc., Cour d’appel [CA][regional court of appeal] Pau, March 23, 2012.

<sup>425</sup> Michael L. Rustad & Maria V. Onufrio, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1145 (2012).

<sup>426</sup> See Bradley Joslove & Andréi V. Krylov, *Standard American Business-to-Consumer Terms and Conditions in the EU*, 18 MICH. J. INT’L L. 2, 2–3 (2005) (highlighting the thirty-one clauses from the AOL terms that the Nanterre court declared null and void due to being either illegal or unfair).

<sup>427</sup> MICHAEL L. RUSTAD, *GLOBAL INTERNET LAW* (Hornbook Series) 367 (2014).

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

rective, the Brussels Regulation governing jurisdiction and the enforcement of judgment and the Rome I Regulation governing choice of law.<sup>431</sup> The lesson of the past fifteen years of U.S. social media contracting practices is that providers that do not localize their agreements to satisfy mandatory consumer law in other countries will face legal liability.

##### 5. CONCLUSION: TWO WORLDS OF SOCIAL MEDIA CONTRACTS AT ODDS

The world of social media is increasingly divided into two radically different legal cultures – Chinese and the United States. “The stark contrast between America’s ‘me-first’ culture and the ‘collective-good’ mentality in China is reflected in the two countries’ use of social networking sites.”<sup>432</sup> Chinese culture’s collectivism is group-oriented and its terms of use reflect concerns about social stability whereas American culture is largely about self-reliance and “freedom from externally imposed constraints.”<sup>433</sup> These two distinctive social media cultures may clash as they enter into each other’s territory.<sup>434</sup>

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<sup>431</sup> See MICHAEL L. RUSTAD, *GLOBAL INTERNET LAW* (Hornbook Series) 360, 368-372 (2014).

<sup>432</sup> Andy Henion & Linda Jackson, *Social Network Use Shows China, U.S. Differences*, MICH. ST. U. TODAY (Feb. 7, 2013), available at <http://archives1.research.msu.edu/stories/social-network-use-shows-china-us-differences> (last visited Feb. 19, 2015) (discussing Linda A. Jackson, Jin-Liang Wang, Cultural differences in social networking site use: A comparative study of China and the United States, *Computers in Human Behavior*, 2013; 29 (3)).

<sup>433</sup> *Some General Differences between Chinese and American Cultures*, available at <http://www.china-nafsa.aief-usa.org/culture/differences.htm> (last visited Feb. 15, 2015).

<sup>434</sup> “Collectivism versus individualism refers to the strength of the ties people have to others within the community. Collectivism shows a strong group cohesion, and there would be a large amount of loyalty and respect for members of the group. Individualism indicates a loose connection with people, and there is a lack of interpersonal connection and little sharing of responsibility, beyond family and perhaps a few close friends . . . . Whereas United States (91) is a highly individualistic society, in which people are supposed to look after themselves and their direct family only.” Shan Luo, *Cross-Cultural Differences Between American and Chinese College Students on Self-Disclosure on Social Media*, at 7 (2014) (M.A. Thesis, Iowa State University), available at <http://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=4975&context=etd> (last visited Feb. 15, 2015) (comparing China’s collectivism to U.S. individualism through social media use).

Currently, the two largest social media countries impose diametrically opposed contracting practices. The Chinese legal system does not permit social media providers and other dominant parties to disclaim warranties and limit liabilities. China's 2014 consumer statute arms the China Consumers' Association, an NPO with government sponsorship, with increased power to initiate public-interest class actions against providers that abuse their customers. Chinese providers follow Chinese contract and consumer laws in not including harsh warranty disclaimers, caps on damages, anti-class action waivers, or one-sided mandatory arbitration clauses that are common in the United States.

Our empirical analysis of the terms of use of the twenty-five largest social media providers demonstrates that American boilerplate systematically forecloses consumer rights in ways that are unlikely to be upheld in China or the European Union. Providers in the United States frequently strip users of any causes of action based upon breach of warranty, cap damages at zero or a nominal amount, dictate class action waivers, and impose mandatory arbitration where the cost of filing far exceeds the amount at stake. America is falling behind China's social media in protecting consumer's rights in online transactions. If the United States wants to continue to be competitive in the international arena and target the Chinese consumer market, its social media providers must adopt a more consumer-friendly approach, while Chinese social media will need to accept more free expression in their online terms of use.