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## Up in the Air: Harmonizing the Sharing Economy Through Airbnb Regulations

Johanna Interian

*Boston College Law School, johanna.interian@bc.edu*

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# UP IN THE AIR: HARMONIZING THE SHARING ECONOMY THROUGH AIRBNB REGULATIONS

JOHANNA INTERIAN\*

**Abstract:** The practice of opening up one's home to accommodate strangers is not new, but it has been revitalized and expanded through the sharing economy and—in particular—through the technology-based platform Airbnb. Despite marketing itself as a tool to connect people across the world, Airbnb has distanced itself from responsibility to its users and the communities in which it operates. As a leader in the sharing economy, Airbnb should be liable for limited actions of hosts consistent with the externalities generated by transient home sharing. A number of European cities serve as a model for how U.S. jurisdictions can respond effectively to the growing demand for short-term housing through Airbnb while also taking into account the externalities that the platform imposes on the permanent housing market. Moreover, the pervasiveness of Airbnb, and the sharing economy as a whole, exposes deficiencies in the federal laws that govern online behavior, revealing the necessity for such laws to be revisited.

## INTRODUCTION

From parking spots to pet sitting, Internet-based sharing applications (or simply, “apps”) have expanded over the years to cover a diverse range of industries.<sup>1</sup> The sharing economy taps into an existing base of items that people already own.<sup>2</sup> Also known as the peer-to-peer economy or collaborative consumption, the sharing economy's appeal—and, in many instances, its profitability—derives from its users repurposing something that they have in excess (or at least a comfort that they can spare) and putting it to use for someone

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\* Johanna Interian is a Note Editor for the *Boston College International & Comparative Law Review*.

<sup>1</sup> See, e.g., PARKER BY STREETLINE, <http://www.theparkerapp.com> [<http://perma.cc/3G75-DQFQ>] (last visited Nov. 11, 2015) (parking spots); DOGVACAY, <http://dogvacay.com> [<http://perma.cc/F23K-T59W>] (last visited Nov. 11, 2015) (pet sitting); Bret Swanson, *The Choice Between Uber and Uber-Regulation*, TECH POL'Y DAILY (June 11, 2014), <http://www.techpolicydaily.com/communications/choice-uber-uber-regulation> [<http://perma.cc/9F8K-P9UH>].

<sup>2</sup> KOOPMAN ET AL., MERCATUR CENTER AT GEO. MASON UNIV., THE SHARING ECONOMY AND CONSUMER PROTECTION REGULATION: THE CASE FOR POLICY CHANGE 4–5 (2014); *The Sharing Economy: Boom and Backlash*, ECONOMIST (Apr. 26, 2014), <http://www.economist.com/news/business/21601254-consumers-and-investors-are-delighted-startups-offering-spare-rooms-or-rides-across-town> [<http://perma.cc/54XE-NSZ5>].

with a corresponding need.<sup>3</sup> Whether it is a bed for the night, a vacuum for an hour, or a private bathroom for a moment, the sharing economy can satisfy a dizzying array of demands.<sup>4</sup> Indeed, “Creative minds, significant advances in technology[,] and a down economy together have led to astonishing changes in the way services are offered and delivered.”<sup>5</sup> The sharing model does not require a centralized entity to carry inventory and is therefore free from the costly logistics associated with maintaining inventory—such as parking or storage—product maintenance, and geographic expansion.<sup>6</sup> By allowing individuals to capitalize on the unused capacity of an asset they already own, the collaborative consumption model eliminates waste in a cost-efficient and convenient way.<sup>7</sup> With an estimated \$3.5 billion in revenue generated in 2013, the peer-to-peer sharing economy has created markets out of goods or services that otherwise would not have been monetized.<sup>8</sup>

The sharing economy is praised for its benefits to consumers in addition to its economic benefits.<sup>9</sup> Ridesharing applications, for example, provide more

<sup>3</sup> See Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Jan. 23, 2013), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy> [https://perma.cc/84PX-4WN2]; see also *The Sharing Economy: Remove the Roadblocks*, ECONOMIST (Apr. 26, 2014), <http://www.economist.com/news/leaders/21601257-too-many-obstacles-are-being-placed-path-people-renting-things-each-other-remove> [http://perma.cc/775Z-VLZR]. By allowing both guests and hosts to rate and review their experiences, the company promotes accountability and a sense of confidence in the service. See KOOPMAN ET AL., *supra* note 2, at 15. Reputational feedback empowers consumers because it narrows the information gap between the consumer and the provider of the product or service and creates an incentive for the provider to strive for customer satisfaction. See *id.* at 15–16. In 2014, Airbnb removed over 2000 listings in New York City in part because the hosts failed to provide an authentic and meaningful experience to their guests. See David Hantman, *Working Together for Home Sharing in New York City*, AIRBNB PUB. POL’Y BLOG (Jan. 20, 2015), <http://publicpolicy.airbnb.com/working-together-home-sharing-new-york-city/> [http://perma.cc/36CR-TZ2H].

<sup>4</sup> See Arun Sundararajan, *From Zipcar to the Sharing Economy*, HARV. BUS. REV. (Jan. 3, 2013), <https://hbr.org/2013/01/from-zipcar-to-the-sharing-eco> [https://perma.cc/BMP3-WUFH]; Melissa Kravitz, *Rent a Potty in NYC: Airpnp Lets People Pay to Use Strangers’ Toilets*, AM NEW YORK (Jan. 20, 2015), <http://www.amny.com/lifestyle/rent-a-potty-in-nyc-airpnp-lets-people-pay-to-use-a-strangers-toilets-1.9825647> [http://perma.cc/2N6E-46QT].

<sup>5</sup> Defendant Uber’s Motion to Dismiss Plaintiff’s Complaint and Supporting Brief at 20, *Ramos v. Uber Techs., Inc.*, 2015 WL 758087 (W.D. Tex. 2015) (No. 5:14-CV-00502-XR) [hereinafter *Uber Motion to Dismiss*].

<sup>6</sup> See KOOPMAN ET AL., *supra* note 2, at 4–5; Sundararajan, *supra* note 4.

<sup>7</sup> See KOOPMAN ET AL., *supra* note 2, at 14.

<sup>8</sup> Liran Einav, Professor, Stan. Univ., *The Economics of Peer-to-Peer Internet Markets*, in *Federal Trade Commission Workshop: The “Sharing” Economy: Issues Facing Platforms, Participants, and Regulators* 11 (June 9, 2015) (transcript available at [https://www.ftc.gov/system/files/documents/public\\_events/636241/sharing\\_economy\\_workshop\\_transcript.pdf](https://www.ftc.gov/system/files/documents/public_events/636241/sharing_economy_workshop_transcript.pdf) [https://perma.cc/9EBG-8HRP]); Geron, *supra* note 3.

<sup>9</sup> See Hantman, *Working Together for Home Sharing in New York City*, *supra* note 3; Letter from Andrew I. Gavil, Dir., Office of Policy Planning, Fed. Trade Comm’n, et al., to Jacques P. Lerner, Gen. Counsel, D.C. Taxicab Comm’n 1–3 (June 7, 2013) (on file with author) [hereinafter *FTC Letter*].

transportation options to people and empower individuals to make more responsible choices that measurably reduce incidences of drunk driving.<sup>10</sup>

Despite their purported benefits, however, sharing-economy companies have been criticized for the way they operate and, in some cases, have been forced to shut down operations.<sup>11</sup> Critics allege that they are evading laws intended to regulate certain practices or businesses in which the companies are engaged.<sup>12</sup> Users of sharing platforms are transformed into “prosumers,” people who produce as well as consume.<sup>13</sup> By blurring the line between consumer and producer, the sharing economy disrupts the traditional model of business where companies own and people consume.<sup>14</sup> Moreover, the sharing concept erodes disinterested public regulation by either substituting it for private regulation or leaving a void of no regulatory oversight.<sup>15</sup> Because transactions in the sharing economy do not fit squarely into the realm of public regulation, many sharing-economy activities continue unregulated or are self-regulated by the very companies participating in the activity.<sup>16</sup>

As sharing-economy start-ups become more widespread, they may reach the point of displacing or even eliminating their long-established, regulated counterparts.<sup>17</sup> There is probably no better example of this than the ridesharing application Uber, which has become ubiquitous in large cities across the United States and abroad.<sup>18</sup> Uber’s smartphone application allows people who are

<sup>10</sup> See FTC Letter, *supra* note 9, at 1–3; UBER & MOTHERS AGAINST DRUNK DRIVING (MADD), UBER AND MADD REPORT 8 (Jan. 2015), <https://blog.uber.com/wp-content/uploads/2015/01/Uber-MADD-Report.pdf> [<http://perma.cc/RM4B-2FGR>]. The Uber and Mothers Against Drunk Driving (MADD) Report shows that drunk-driving car accidents decreased by 6.5% among drivers under 30 in the cities where UberX operates since its California launch in the summer of 2012. UBER & MOTHERS AGAINST DRUNK DRIVING (MADD), *supra*. In Seattle, Uber’s launch coincided with a 10% decrease in arrests for driving under the influence. *Id.* at 3.

<sup>11</sup> See David Jolly, *Uber Is Ordered by Spain and Thailand to Halt Operations*, N.Y. TIMES (Dec. 9, 2014), <http://www.nytimes.com/2014/12/10/technology/uber-is-ordered-by-spain-and-thailand-to-halt-operations.html> [<http://perma.cc/9DVN-DPAZ>]; Claire Cain Miller, *When Uber and Airbnb Meet the Real World*, N.Y. TIMES (Oct. 17, 2014), <http://www.nytimes.com/2014/10/19/upshot/when-uber-lyft-and-airbnb-meet-the-real-world.html> [<http://perma.cc/W8H4-93GU>].

<sup>12</sup> See David Streitfeld, *Airbnb Listings Mostly Illegal, New York State Contends*, N.Y. TIMES (Oct. 15, 2014), <http://www.nytimes.com/2014/10/16/business/airbnb-listings-mostly-illegal-state-contends.html> [<http://perma.cc/X9KM-WBE6>].

<sup>13</sup> Giorgos Kallis, *Airbnb Is a Rental Economy, Not a Sharing Economy*, PRESS PROJECT (Oct. 24, 2014), <http://www.thepressproject.net/article/68073/AirBnb-is-a-rental-economy-not-a-sharing-economy> [<http://perma.cc/6L8W-AYEL>].

<sup>14</sup> See Sundararajan, *supra* note 4; Geron, *supra* note 3.

<sup>15</sup> See Joshua Gans, Professor, Rotman Sch. of Mgmt., Univ. of Toronto, *Sharing Economy Platforms: Market Design and Market Structure*, in Federal Trade Commission Workshop: The “Sharing” Economy: Issues Facing Platforms, Participants, and Regulators, *supra* note 8, at 26.

<sup>16</sup> See *id.* at 25.

<sup>17</sup> See Georgios Zervas et al., *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry 2* (B.U. Sch. Mgmt., Research Paper No. 2013-16, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2366898](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366898) [<http://perma.cc/D2QY-J683>].

<sup>18</sup> See Geron, *supra* note 3.

looking for a ride to connect with people who are looking to provide rides with their own vehicles in order to earn income.<sup>19</sup> Recently valued at \$51 billion, Uber has increased in value faster than both Facebook and Google to become one of the most profitable start-ups in the United States.<sup>20</sup> Lately, however, the popular ridesharing application has been on a bumpy road, facing legal challenges in various cities worldwide.<sup>21</sup>

Another one of the most prominent platforms to emerge from the sharing economy is Airbnb, which allows people seeking temporary accommodations to connect with individuals willing to rent space in their homes.<sup>22</sup> Apart from allowing would-be hotel guests to find more affordable lodging on its platform, Airbnb claims that it produces economic growth for the cities in which it operates.<sup>23</sup> Airbnb purportedly encourages people to venture into areas less frequented by tourists and to travel when they would otherwise stay home.<sup>24</sup> Although other home-sharing online platforms have emerged, Airbnb's growth—both in terms of geographical reach and profit margins—makes it the irrefutable leader of the home-sharing apps industry.<sup>25</sup>

This Note focuses on Airbnb as a leader in the sharing economy and argues that Airbnb should be held liable for limited actions of hosts that are consistent with the externalities typically associated with transient home sharing. Part I of this Note provides background on the sharing economy and an overview of Airbnb. Part II discusses the regulations implemented in various jurisdictions in both the United States and Europe following the arrival of Airbnb. It presents a discussion of the various legal frameworks that typically govern relationships resembling, though not squarely matching, those between Airbnb, its hosts, and its guests. Part III argues that Airbnb's simultaneous uniqueness and resemblance to traditional legal relationships calls for limited duties and regulations to apply.

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<sup>19</sup> Uber Motion to Dismiss, *supra* note 5, at 3.

<sup>20</sup> Al Ramadan et al., *Behind Uber's Soaring Value*, FORTUNE (Dec. 11, 2014), <http://fortune.com/2014/12/11/behind-ubers-soaring-value/> [<http://perma.cc/7CW6-HDD6>]; Scott Austin et al., *The Billion Dollar Startup Club: All Companies as of October 2015*, WALL ST. J., <http://graphics.wsj.com/billion-dollar-club/> [<http://perma.cc/5DED-TDPG>] (last visited Nov. 11, 2015).

<sup>21</sup> See Jolly, *supra* note 11; Douglas MacMillan et al., *Airbnb Weighs Employee Stock Sale at \$13 Billion Valuation*, WALL ST. J. (Oct. 23, 2014), <http://www.wsj.com/articles/airbnb-mulls-employee-stock-sale-at-13-billion-valuation-1414100930> [<http://perma.cc/3VG2-W6T2>].

<sup>22</sup> See *The Sharing Economy: Boom and Backlash*, *supra* note 2.

<sup>23</sup> See Hantman, *Working Together for Home Sharing in New York City*, *supra* note 3.

<sup>24</sup> See *id.*

<sup>25</sup> See Ramadan et al., *supra* note 20.

## I. BACKGROUND

## A. “The New, Old Way to Travel”: The Rise of Airbnb

Founded in San Francisco in 2008, Airbnb allows people to list living spaces and accommodations in order to host travelers for anywhere from one day to several months.<sup>26</sup> It is a self-proclaimed “global community marketplace that connects travelers seeking authentic, high-quality accommodations with hosts who offer unique places to stay.”<sup>27</sup> Although the concept of sharing underutilized space is not new, Airbnb has multiplied these interactions exponentially.<sup>28</sup> Co-founder Brian Chesky speaks of the innovative start-up with an air of nostalgia, referring to Airbnb as “the new, old way to travel.”<sup>29</sup> He fondly recalls stories his late grandfather told him about traveling as a kid and staying in boarding homes: “[N]eighbors shared what they had, and ordinary people powered the economy . . . .”<sup>30</sup> These activities are reemerging through the new movement of the sharing economy, which is powered by ordinary people and software application-based platforms.<sup>31</sup> In its inaugural year, Airbnb (then operating as AirBed and Breakfast) provided accommodations for more than 600 people attending the Democratic National Convention when traditional accommodations in Denver were overbooked.<sup>32</sup> Now, the home-sharing pioneer operates in more than 34,000 cities across the world.<sup>33</sup> The company profits from transactions that are conducted through its platform by way of a flat 3% commission from hosts and a fee that ranges between 6 and 12% of the reservation cost from guests.<sup>34</sup>

Studies suggest that Airbnb is impacting—if not transforming—the hospitality industry, particularly for budget and lower-end hotels.<sup>35</sup> In some markets,

<sup>26</sup> See *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> [<https://perma.cc/VAK7-PS9S>] (last visited Nov. 11, 2015).

<sup>27</sup> AIRBNB PUBLIC POL’Y BLOG, <http://publicpolicy.airbnb.com> [<http://perma.cc/9LFA-BD3R>] (last visited Nov. 11, 2015).

<sup>28</sup> See Molly Cohen & Corey Zehngbot, *What’s Old Becomes New: Regulating the Sharing Economy*, 58-SPG BOS. B. J. at 6, 6; Zervas et al., *supra* note 17, at 2. Airbnb claims that 11 million people have used its platform to find a place to stay. See *The Sharing Economy: Remove the Roadblocks*, *supra* note 3.

<sup>29</sup> Brian Chesky, *Who We Are, What We Stand For*, AIRBNB BLOG (Oct. 3, 2013), <http://blog.airbnb.com/who-we-are> [<http://perma.cc/435T-4K82>].

<sup>30</sup> *Id.*

<sup>31</sup> See *Uber Motion to Dismiss*, *supra* note 5, at 2; Chesky, *supra* note 29.

<sup>32</sup> Erick Schonfeld, *AirBed and Breakfast Takes Pad Crashing to a Whole New Level*, TECHCRUNCH (Aug. 11, 2008), <http://techcrunch.com/2008/08/11/airbed-and-breakfast-takes-pad-crashing-to-a-whole-new-level> [<http://perma.cc/WX8B-7MH4>].

<sup>33</sup> *The Sharing Economy: Boom and Backlash*, *supra* note 2.

<sup>34</sup> See OFFICE OF THE N.Y. ST. ATT’Y GEN., AIRBNB IN THE CITY 7 (2014) [hereinafter ATT’Y GEN. AIRBNB REPORT]; *Terms of Service*, AIRBNB, <https://www.airbnb.com/terms> [<https://perma.cc/66JJ-CJ6R>] (last visited Nov. 11, 2015).

<sup>35</sup> Zervas et al., *supra* note 17, at 19.

Airbnb may be taking as much as 13% of the revenue that would otherwise flow to the industry's most vulnerable hotels.<sup>36</sup> Airbnb's \$25.5 billion valuation represents a higher valuation than some of its largest hotel competitors—including Wyndham Worldwide Corporation and Hyatt Hotels Corporation, which, in 2014, were valued at \$9.4 billion and \$9.2 billion, respectively.<sup>37</sup> Airbnb's functional resemblance to the hospitality industry raises questions about how to deal with taxation, safety regulations, and other industry rules that bind traditional companies in the hospitality industry.<sup>38</sup>

### B. Finding a Regulatory Home for Airbnb

The proper regulation of sharing companies like Airbnb is a novel issue with no consensus regarding its resolution.<sup>39</sup> Associate Justices for the New York State Supreme Court, Thomas A. Dickerson and Sylvia O. Hinds-Radix, concede, "While Expedia, Priceline[,] and Hotwire are best defined as retailers and resellers and, as such, can be controlled and taxed accordingly, it is much more difficult to find a comparable taxing analogue for the Internet-sharing economy."<sup>40</sup> Major cities in both the United States and Europe either have begun implementing regulations regarding home sharing or have launched investigations with the aim of bringing the sharing economy into compliance with existing laws.<sup>41</sup>

Airbnb's website now includes an overview of myriad local regulations and laws that may apply to hosts in various jurisdictions.<sup>42</sup> Hosts may, but are not required, to consult these regulations when creating a listing.<sup>43</sup> The company's website currently provides specific information for forty-seven U.S. cities, including links to where the laws are located online or which local office hosts can contact with questions.<sup>44</sup> Apart from the specific laws, Airbnb warns hosts

<sup>36</sup> See *id.* at 4.

<sup>37</sup> See Austin et al., *supra* note 20; MacMillan et al., *supra* note 21.

<sup>38</sup> See *The Sharing Economy: Remove the Roadblocks*, *supra* note 3.

<sup>39</sup> See Geron, *supra* note 3.

<sup>40</sup> Thomas A. Dickerson & Sylvia O. Hinds-Radix, *Taxing Internet Transactions: Airbnb and the Sharing Economy*, 86 N.Y. ST. B.J. 49, 50 (2014).

<sup>41</sup> See *id.*; see also DEP'T FOR COMMUNITIES AND LOC. GOV'T, PROMOTING THE SHARING ECONOMY IN LONDON: POLICY ON SHORT-TERM USE OF RESIDENTIAL PROPERTY IN LONDON (2015) (discussing the city of London); Tim Logan, *Airbnb Touts Its Economic Benefits as L.A. Leaders Seek to Clamp Down*, L.A. TIMES (Dec. 4, 2014), <http://www.latimes.com/business/la-fi-airbnb-la-20141205-story.html> [<http://perma.cc/J8ZQ-EEJ7>] (discussing the city of Los Angeles).

<sup>42</sup> See *Responsible Hosting*, AIRBNB, <https://www.airbnb.com/help/responsible-hosting> [<https://perma.cc/CJX8-HAZB>] (last visited Nov. 11, 2015).

<sup>43</sup> See, e.g., *Arlington County, VA*, AIRBNB, <https://www.airbnb.com/help/article/922> [<https://perma.cc/6PUF-HCMG>] (last visited Nov. 11, 2015); *Minneapolis, MN*, AIRBNB, <https://www.airbnb.com/help/article/948> [<https://perma.cc/D79U-SYL4>] (last visited Nov. 11, 2015); *Palm Springs, CA*, AIRBNB, <https://www.airbnb.com/help/article/907> [<https://perma.cc/SU3L-9UD4>] (last visited Nov. 11, 2015).

<sup>44</sup> See *Responsible Hosting*, AIRBNB, *supra* note 42.

that it is “important to understand and abide by other contracts or rules that bind you, such as leases, condo board or co-op rules, HOA [homeowners association] rules, or rules established by tenant organizations.”<sup>45</sup> Airbnb urges hosts who are renters to refer to their lease agreements and to check with their landlords for other rules that may apply.<sup>46</sup> Although the specific wording of regulations varies, many laws apply to stays lasting fewer than thirty days, which means the majority of stays booked through Airbnb would be subject to these regulations.<sup>47</sup>

Airbnb claims to be “committed to working with local officials” and plans to continue advocating for changes that will “allow regular people to rent out their own homes.”<sup>48</sup> To this end, the company already has begun collecting tourist taxes from guests on behalf of Airbnb hosts in Portland, San Francisco, San Jose, Chicago, Washington, D.C., and Amsterdam.<sup>49</sup> Despite these overtures, however, the company maintains that it is not required to collect hotel room occupancy taxes on behalf of hosts, citing guidance from tax authorities.<sup>50</sup>

### C. Legal Impacts of the Collaborative Consumption Model

The sharing economy challenges traditional models of public regulation.<sup>51</sup> As a threshold matter, the status of the relationship between the parties is ambiguous.<sup>52</sup> Moreover, these peer-to-peer sharing marketplaces are unlike Ma-

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<sup>45</sup> E.g., *Louisville, KY*, AIRBNB, <https://www.airbnb.com/help/article/918> [<https://perma.cc/YTD9-CWUJ>] (last visited Nov. 11, 2015); *New Orleans, LA*, AIRBNB, <https://www.airbnb.com/help/article/867> [<https://perma.cc/7ZNW-SBMU>] (last visited Nov. 11, 2015); *West Hollywood, CA*, AIRBNB, <https://www.airbnb.com/help/article/911> [<https://perma.cc/7FZC-LU4D>] (last visited Nov. 11, 2015).

<sup>46</sup> See *Boulder, CO*, AIRBNB, <https://www.airbnb.com/help/article/909> [<https://perma.cc/5DNE-XQSB>] (last visited Nov. 11, 2015); *Chicago, IL*, AIRBNB, <https://www.airbnb.com/help/article/861> [<https://perma.cc/W8J6-E9K2>] (last visited Nov. 11, 2015); *Houston, TX*, AIRBNB, <https://www.airbnb.com/help/article/905> [<https://perma.cc/6FBQ-S2PD>] (last visited Nov. 11, 2015).

<sup>47</sup> E.g., MALIBU, CA. MUN. CODE ch. 3.24, § 20 (Dec. 2014) (“Transient means any person who exercises occupancy or is entitled to occupancy for a period of thirty (30) consecutive calendar days or less . . . .”); see also PORTLAND, OR., ZONING CODE ch. 33.207, § 20(A) (1991); *Airbnb Economic Impact*, AIRBNB BLOG, <http://blog.airbnb.com/economic-impact-airbnb/> [<http://perma.cc/CXD2-HFUT>] (last visited Nov. 11, 2015).

<sup>48</sup> See, e.g., *South Lake Tahoe, CA*, AIRBNB, <https://www.airbnb.com/help/article/917> [<https://perma.cc/S4JN-D9RR>] (last visited Nov. 11, 2015). In addition to helping hosts understand the kinds of taxes that might apply to them, Airbnb provides income tax forms to U.S. hosts. See David Hantman, *Working Together to Collect and Remit in Washington D.C. and Chicago, Illinois*, AIRBNB PUBLIC POL’Y BLOG (Jan. 28, 2015), <http://publicpolicy.airbnb.com/working-together-collect-remit-washington-d-c-chicago-illinois> [<http://perma.cc/PK5K-QFYV>].

<sup>49</sup> See Hantman, *Working Together to Collect and Remit in Washington D.C. and Chicago, Illinois*, *supra* note 48. In the cities of Portland and San Francisco, the company has already collected over five million dollars in tourist taxes from guests on behalf of Airbnb hosts. *Id.*

<sup>50</sup> See ATT’Y GEN. AIRBNB REPORT, *supra* note 34, at 9.

<sup>51</sup> See Gans, *supra* note 15, 25–26.

<sup>52</sup> See Cohen & Zehngelot, *supra* note 28, at 7.



cy's, Target, and Hilton—all of which conduct business online but also have physical locations.<sup>53</sup> Sharing applications exist solely in a virtual environment with the company operating its peer-to-peer services platform all over the country without any corresponding physical locations.<sup>54</sup> The duties owed to various parties and non-parties in Airbnb transactions, therefore, are difficult to define.<sup>55</sup> As a specific example, tort law recognizes a special relationship between an innkeeper and his guest, which gives rise to a duty of reasonable care of the innkeeper to protect the guest.<sup>56</sup> An innkeeper is defined as “[s]omeone who, for compensation, keeps open a public house for the lodging and entertainment of travelers.”<sup>57</sup> A corporation that owns a hotel is held responsible as an innkeeper, whereas a salaried employee of the hotel is not liable.<sup>58</sup> Similarly, a sole proprietor who owns and operates a hotel is liable as the innkeeper.<sup>59</sup> Yet, in a transaction where a room in a residential apartment is offered by a tenant (the host) without the consent of the apartment owner (the landlord) and facilitated by an online platform that receives a fee from the host's earnings (Airbnb), the analysis is not as clear-cut as it is in a traditional two-party transaction.<sup>60</sup> At least two entities—the host and Airbnb—receive direct compensation from the transaction and contribute to providing the accommodation; on these facts, however, it is unclear which of the two parties bears the duty of reasonable care to the guest.<sup>61</sup>

Despite the legal gray areas, it is not hard to see why the sharing economy has grown so expeditiously.<sup>62</sup> As a commentator notes:

Millennials, the ascendant economic force in America, have been culturally programmed to borrow, rent and share. They don't buy newspapers; they grab and disseminate stories a la carte via Facebook and Twitter. They don't buy DVD sets; they stream shows. They don't buy CDs; they subscribe to music on services such as Spotify or Pandora (or just steal it).<sup>63</sup>

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<sup>53</sup> See Uber Motion to Dismiss, *supra* note 5, at 11.

<sup>54</sup> See *id.*

<sup>55</sup> See Dickerson & Hinds-Radix, *supra* note 40, at 50.

<sup>56</sup> See RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 40 (AM. LAW INST. 2012).

<sup>57</sup> *Innkeeper*, BLACK'S LAW DICTIONARY (10th ed. 2014); see *Taboada v. Daly Seven, Inc.*, 641 S.E.2d 68, 68 (2007).

<sup>58</sup> See JOHN H. SHERRY, THE LAWS OF INNKEEPERS § 2.6, at 15 (rev. ed. 1981); *Innkeeper*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>59</sup> See SHERRY, *supra* note 58, at 15.

<sup>60</sup> See RESTATEMENT (THIRD) OF TORTS § 40; *Terms of Service*, *supra* note 34.

<sup>61</sup> See RESTATEMENT (THIRD) OF TORTS § 40, cmt. d; Cohen & Zehngbot, *supra* note 28, at 8.

<sup>62</sup> See Cohen & Zehngbot, *supra* note 28, at 6; Geron, *supra* note 3.

<sup>63</sup> Geron, *supra* note 3.

Moreover, proponents of the sharing economy tend to see regulations as protecting well-established, dominant, and unsympathetic industry operators, such as taxicabs and hotel chains.<sup>64</sup> Finally, even with the success of collaborative consumption, some corporate entities have embraced the sharing economy, even if only for the marketing potential a partnership offers.<sup>65</sup>

## II. DISCUSSION

### *A. Favorable Reception and Lesser Legal Restrictions for Technology Companies in the United States*

The sharing economy is credited with lowering transaction costs, increasing efficiency, and encouraging both accountability and competition.<sup>66</sup> In light of how these effects serve the interests of consumers, the sharing economy has received praise from the Federal Trade Commission (FTC), the agency charged with enforcing laws that prohibit unfair competition and unfair or deceptive business practices.<sup>67</sup> The FTC notes that peer-to-peer software applications “may be more responsive to consumer demand, may promote a more efficient allocation of resources . . . to consumers, may expand demand for . . . services, and may reduce consumers’ transaction costs in paying for such services.”<sup>68</sup> The agency went on to encourage regulation of sharing software applications in a way that will not stifle the benefits such technologies can offer consumers.<sup>69</sup> On June 9, 2015, the FTC hosted a workshop to “examine competition, consumer protection, and economic issues arising in the sharing economy” in an effort to better understand the unique role of the growing sharing economy.<sup>70</sup>

The United States has established a friendly legal landscape for technological innovation that in turn creates high profits for U.S. companies as well as economic growth.<sup>71</sup> The allure of innovation taking place in Silicon Valley has prompted some to compare the northern California city to Florence during

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<sup>64</sup> See Cohen & Zehngbot, *supra* note 28, at 6.

<sup>65</sup> See Geron, *supra* note 3. General Motors (GM) has invested in RelayRides, which pairs a person needing a vehicle for a short time with car owners willing to rent theirs, in the hopes that people sharing a GM car will eventually buy one of their own. See *id.* GM can also benefit from the incentive that purchasing a new car can now come with a rental income stream. See *id.*

<sup>66</sup> See KOOPMAN ET AL., *supra* note 2, at 4–5; Cohen & Zehngbot, *supra* note 28, at 7.

<sup>67</sup> See KOOPMAN ET AL., *supra* note 2; FTC Letter, *supra* note 9, at 1–3.

<sup>68</sup> FTC Letter, *supra* note 9, at 3.

<sup>69</sup> See *id.* at 5.

<sup>70</sup> William F. Adkinson, Jr., Att’y Advisor, Office of Policy Planning, FTC, Welcome Remarks and Announcements, in Federal Trade Commission Workshop: The “Sharing” Economy: Issues Facing Platforms, Participants, and Regulators, *supra* note 8, at 1.

<sup>71</sup> See Letter from Am. Booksellers Found. for Free Expression et al., to Hon. John Rockefeller IV, Chairman, Comm. on Commerce, Sci., and Transp., U.S. Senate et al. 1 (July 30, 2013) (on file with author) [hereinafter Am. Booksellers Found. Letter].

the Renaissance.<sup>72</sup> Policies that encourage investment in technology have helped the United States become home to more start-ups valued at over one billion dollars than any other country.<sup>73</sup> Addressing concerns about stifling innovation, the United States has ensured decreased liability for Internet Service Providers (ISPs) through legislation such as § 230 of the Communications Decency Act (CDA).<sup>74</sup> Enacted in 1996, the CDA's well-known safe harbor provision is credited with bringing about the modern era of Internet development.<sup>75</sup> Innovation-protective policies, exemplified by § 230, contribute to the hospitable environment for innovation in the United States, but also make establishing liability for technology platforms more elusive.<sup>76</sup>

### 1. Section 230 of the Communications Decency Act

The U.S. Congress enacted § 230 of the CDA to encourage responsible practices regarding online content without discouraging the development of the Internet.<sup>77</sup> Largely considered the most influential law in the development of the Internet, § 230 is interpreted as immunizing ISPs from liability under certain circumstances.<sup>78</sup> The operative provision states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."<sup>79</sup> An ISP is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."<sup>80</sup> This broad definition is understood to include Airbnb, which provides an interactive computer service through its platform to connect potential guests with hosts.<sup>81</sup>

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<sup>72</sup> See *Silicon Valley: To Fly, To Fall, To Fly Again*, ECONOMIST (July 25, 2015), <http://www.economist.com/news/briefing/21659722-tech-boom-may-get-bumpy-it-will-not-end-repeat-dotcom-crash-fly> [<http://perma.cc/7PVF-S94X>].

<sup>73</sup> See *Silicon Valley: Empire of the Geeks*, ECONOMIST (July 25, 2015), <http://www.economist.com/news/leaders/21659745-silicon-valley-should-be-celebrated-its-insularity-risks-backlash-empire-geeks> [<http://perma.cc/T79R-26QJ>]; Austin et al., *supra* note 20; Am. Booksellers Found. Letter, *supra* note 71, at 1. The United States is home to approximately 65% of the world's privately held start-up companies valued at \$1 billion or more by venture-capital firms. See Austin et al., *supra* note 20.

<sup>74</sup> See 47 U.S.C. § 230 (1998).

<sup>75</sup> See Am. Booksellers Found. Letter, *supra* note 71, at 1.

<sup>76</sup> See Michael L. Rustad, *Circles of E-Consumer Trust: Old E-America v. New E-Europe*, 16 MICH. ST. J. INT'L L. 183, 189, 197, 199–200, 205 (2007); Am. Booksellers Found. Letter, *supra* note 71, at 1.

<sup>77</sup> See 47 U.S.C. § 230; Am. Booksellers Found. Letter, *supra* note 71, at 1.

<sup>78</sup> See *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998).

<sup>79</sup> 47 U.S.C. § 230(c)(1).

<sup>80</sup> *Id.* § 230(f)(3).

<sup>81</sup> See *id.*

The way in which § 230 has been applied to defamation cases helps clarify Airbnb's potential liability for the content posted by users on its website.<sup>82</sup> For online defamation cases, the ISP is held liable as a speaker of the defamatory content if the ISP is responsible, either in whole or in part, for creating the content.<sup>83</sup> Section 230 has resulted in very little intermediary liability on behalf of ISPs for content posted online.<sup>84</sup> It distinguishes between publishers of online content and mere distributors—much like the distinction in the offline world.<sup>85</sup> Publishers are liable for defamatory speech because they are responsible for examining the content and have some editorial control over the final product.<sup>86</sup> Mere distributors are generally exempt from liability because they distribute already-produced works.<sup>87</sup>

Section 230 is concerned with preserving constitutional protections online because of the significant public interest in protecting anonymous free speech both offline and online.<sup>88</sup> Imposing liability on distributors would require them to be substantially more involved in how they choose works to distribute in their stores and on their platforms.<sup>89</sup> This obligation would be overly burdensome on the distributor.<sup>90</sup> Generally, the distributor is only held liable if it had reason to know the content was defamatory but disseminated it anyway.<sup>91</sup> It was important to create broad protections for ISPs in the context of defamation because of the free speech element involved.<sup>92</sup> Too much filtering of content for fear of liability could result in censorship of legal content and would chill speech online.<sup>93</sup>

Critics of § 230 have found fault in the CDA's perverse incentive for ISPs to not engage in any filtering or screening.<sup>94</sup> This hands-off approach often promotes innovation at the expense of consumer protection.<sup>95</sup> Encouraging ISPs not to have a filtering regime so that they will not have reason to know

<sup>82</sup> See *Blumenthal*, 992 F. Supp. at 52.

<sup>83</sup> See 47 U.S.C. § 230(c); *Blumenthal*, 992 F. Supp. at 52–53.

<sup>84</sup> See Am. Booksellers Found. Letter, *supra* note 71, at 1.

<sup>85</sup> See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331–32 (4th Cir. 1997).

<sup>86</sup> See *id.* at 332.

<sup>87</sup> See *id.*

<sup>88</sup> See Am. Booksellers Found. Letter, *supra* note 71, at 1–2.

<sup>89</sup> See *Zeran*, 129 F.3d at 333; Daniel Lyons, *FTC Overlooks True Villains in AT&T Cramming Settlement*, TECH POL'Y DAILY (Oct. 22, 2014), <http://www.techpolicydaily.com/communications/ftc-overlooks-true-villains-att-cramming-settlement> [<http://perma.cc/U8W8-TL4H>].

<sup>90</sup> See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991); Am. Booksellers Found. Letter, *supra* note 71, at 2.

<sup>91</sup> See *Zeran*, 129 F.3d at 332.

<sup>92</sup> See *Cubby*, 776 F. Supp. at 139.

<sup>93</sup> See *Zeran*, 129 F.3d at 333.

<sup>94</sup> See Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 112–13 (2007).

<sup>95</sup> See Am. Booksellers Found. Letter, *supra* note 71, at 2.

the published content violated the law will inevitably lead to more defamatory, harassing, or otherwise unlawful content appearing in cyberspace.<sup>96</sup>

In a departure from the enhanced protection of defamatory content, federal courts have found that ISPs that provide users the means to violate other laws may not benefit from § 230 immunity.<sup>97</sup> The Ninth Circuit held in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* that a website that plays a role in creating user profiles for people searching for and renting housing is not immune from § 230 intermediary liability if it enables discriminatory housing practices.<sup>98</sup> The Fair Housing Act (FHA) was enacted to provide, within constitutional limitations, for fair housing throughout the United States.<sup>99</sup> The FHA made it illegal to refuse to rent, sell, offer, refuse to negotiate, or *otherwise make unavailable or deny* housing to any person because of race, color, religion, sex, familial status, national origin, or sometimes handicap.<sup>100</sup> Although members of the court diverged in parts of their reasoning, the judges agreed that a questionnaire requiring users to answer in a way that ran afoul of the FHA was speech attributable to the website.<sup>101</sup> The court reasoned that the site was helping to create the content “in part” and that this partial contribution justified exposing the ISP to liability.<sup>102</sup> In other words, providing its users a platform to answer questions considered discriminatory under the FHA could give rise to intermediary liability for the site.<sup>103</sup> The result in *Roommates.com* indicates that although § 230 is thought to have broad applicability in immunizing ISPs, the ISP may nonetheless incur liability for content that it has a hand in creating.<sup>104</sup>

### *C. Relationships Between Airbnb, Hosts, and Guests: Rogue or Regulated?*

Whether Airbnb can be held liable for the acts or omissions of hosts depends in part on whether the company’s relationship with its hosts and guests is more similar to that of an independent contractor, joint venture, or something else entirely.<sup>105</sup> Airbnb is frequently placed in the same category as hotels

<sup>96</sup> See 47 U.S.C. § 230; Lemley, *supra* note 94, at 101, 111.

<sup>97</sup> See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164–65 (9th Cir. 2008).

<sup>98</sup> See *id.*

<sup>99</sup> See 42 U.S.C. § 3601.

<sup>100</sup> *Id.* § 3604.

<sup>101</sup> *Roommates.com, LLC*, 521 F.3d at 1162, 1164, 1168, 1172.

<sup>102</sup> See *id.*

<sup>103</sup> See *id.* at 1172.

<sup>104</sup> See *id.* at 1162–63.

<sup>105</sup> See Memorandum in Opposition to Plaintiff’s Motion for a Preliminary Injunction & in Support of Airbnb, Inc.’s Cross-Motion for Partial Dismissal at 5–6, *New Yorkers Making Ends Meet in the Sharing Economy v. Airbnb, Inc.*, No. 158526/2014 (N.Y. Sup. Ct. Oct. 1, 2014).

due to its role in facilitating short-term accommodations—often for out-of-town visitors.<sup>106</sup> Indeed, it is not unusual for Airbnb hosts to provide guests with amenities strikingly similar to those a hotel would offer.<sup>107</sup> This association with the hospitality industry creates issues regarding liability and the duties Airbnb owes to guests or hosts during the course of the stay as well as afterwards if a claim is brought.<sup>108</sup> Nevertheless, Airbnb is not a hotel because a hotel is generally defined as “an establishment providing accommodation and meals for payment” or, alternatively, as “a public house[.]”<sup>109</sup> Because laws governing hotels—including safety requirements and tax provisions—do not explicitly apply to Airbnb due to fundamental differences between the entities, other areas of the law may dictate how Airbnb should be treated.<sup>110</sup>

### 1. Independent Contractor: The Uber Defense

One way to categorize Airbnb, and thereby to identify its potential liabilities, is as an independent contractor, which is how Uber has characterized its relationship to its drivers in recent litigation.<sup>111</sup> Despite the FTC’s tacit endorsement of software applications that power ridesharing, Uber has encountered roadblocks in many of the cities in which it operates.<sup>112</sup> In 2014, a wide variety of cities with different approaches to domestic policies found common ground on one area of domestic policy: the shutdown of Uber.<sup>113</sup> Local governments in Thailand, India, and a number of European states ordered the ridesharing technology company to halt operations.<sup>114</sup> In addition, taxi associations have brought lawsuits claiming violations of local laws and competition rules; individuals have also filed suits alleging sexual assault by Uber drivers.<sup>115</sup>

There also has been resistance to Uber in the United States.<sup>116</sup> Most major U.S. cities have long used a taxi medallion system, in which the city issues a

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<sup>106</sup> See *The Sharing Economy: Remove the Roadblocks*, *supra* note 3.

<sup>107</sup> See *Brookford, LLC v. Penraat*, 47 Misc.3d 723, 727–38 (N.Y. Sup. Ct. 2014). In an ongoing New York case, an Airbnb host was involved in a “highly organized and apparently successful hotel business . . .” *Id.* at 727. Guests checked in at 2:00 p.m., checked out at 10:00 a.m. and in between were provided “fresh linens and towels, toiletries, a hair-dryer, ironing facilities, kitchen, television, [etc.]” *Id.* at 726. The host also provided Airbnb guests with a map of New York City, a dolly for their luggage, and tips for finding discount Broadway tickets. *Id.*

<sup>108</sup> *The Sharing Economy: Remove the Roadblocks*, *supra* note 3.

<sup>109</sup> *Hotel*, OXFORD AMERICAN DICTIONARY AND THESAURUS WITH LANGUAGE GUIDE (2d ed. 2003).

<sup>110</sup> See *The Sharing Economy: Remove the Roadblocks*, *supra* note 3.

<sup>111</sup> See *Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, 2015 WL 758087, at \*11 (W.D. Tex. Feb. 20, 2015).

<sup>112</sup> See Jolly, *supra* note 11; FTC Letter, *supra* note 9, at 2–3.

<sup>113</sup> Jolly, *supra* note 11.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See *id.*

fixed number of medallions and drivers are required to own or rent a medallion in order to operate a taxi.<sup>117</sup> Uber is able to offer a more affordable service because it operates without the high-priced medallion that its U.S. taxicab competitors are required to lease every year.<sup>118</sup> On December 7, 2014, Portland's city government announced its intention to sue Uber and enjoin it from operating in Oregon's largest city.<sup>119</sup> Shortly before Portland's threat, a Nevada judge issued an injunction against Uber amid accusations of unfair competition with taxi companies, which are required to follow strict rules regarding drivers and insurance.<sup>120</sup> The Nevada Transportation Authority has since addressed this issue by approving permits for Uber to operate in the state.<sup>121</sup>

Cases have been brought against Uber for various claims, including assaults involving its drivers, Title III discrimination against mobility-impaired Uber riders, and unlawful withholding of gratuity from Uber drivers.<sup>122</sup> The ridesharing company has struggled to cast off responsibility for its drivers by claiming that they are independent contractors or simply "App-users," rather than traditional service employees.<sup>123</sup> Uber maintains that sharing-economy companies "merely provide a platform for people with particular skills or assets to connect with other people looking to pay for those skills or assets."<sup>124</sup> Uber defended this position in *Lavitman v. Uber Technologies, Inc.* by pointing to the nature of the company's business model as well as to the driver's ownership of an independent taxi company, his ability to determine his own work schedule and passengers, and his use of other non-Uber dispatch services.<sup>125</sup> Nonetheless, the Massachusetts Superior Court found that Uber, in its motion to dismiss, had not met its burden of proving that the plaintiff was an inde-

<sup>117</sup> Josh Barro, *Under Pressure from Uber, Taxi Medallion Prices Are Plummeting*, N.Y. TIMES (Nov. 27, 2014), <http://www.nytimes.com/2014/11/28/upshot/under-pressure-from-uber-taxi-medallion-prices-are-plummeting.html> [<http://perma.cc/WAE6-MVGG>].

<sup>118</sup> *Id.*

<sup>119</sup> Jolly, *supra* note 11.

<sup>120</sup> MacMillan et al., *supra* note 21.

<sup>121</sup> See Matt Alderton, *Uber, Lyft Roll Into Vegas . . . Finally*, SUCCESSFUL MEETINGS (Sept. 16, 2015), <http://www.successfulmeetings.com/News/Destinations/West/Uber,-Lyft-Roll-into-Vegas-...-Finally/> [<http://perma.cc/2Y3W-7HCV>].

<sup>122</sup> See *Ramos*, 2015 WL 758087, at \*1; *Lavitman v. Uber Technologies, Inc. et al*, No. 129442, 2015 BL 41190, at \*5–6 (Mass. Sup. Ct. Jan. 26, 2015); Allison Pohle, *Boston Uber Driver Charged with Sexual Assault*, BOSTON.COM (Feb. 9, 2015), <http://www.boston.com/news/2015/02/09/boston-uber-driver-charged-with-sexual-assault/mk9JpGjETqs5nMtqfvHDCJ/story.html> [<http://perma.cc/X6N8-KXG7>].

<sup>123</sup> *Ramos*, 2015 WL 758087, at \*13–14; see *Lavitman*, 2015 BL 41190, at \*6; see also Uber Motion to Dismiss, *supra* note 5, at 3, 16. Uber emphasizes that the company only controls its smartphone app and "does not own vehicles, employ or dispatch drivers, and cannot require the people who log onto its App to modify their vehicles." Uber Motion to Dismiss, *supra* note 5, at 5.

<sup>124</sup> Uber Motion to Dismiss, *supra* note 5, at 3.

<sup>125</sup> *Lavitman*, 2015 BL 41190, at \*6.

pendent contractor.<sup>126</sup> This finding makes it unlikely that Airbnb hosts would qualify as independent contractors given that Airbnb places fewer restrictions on hosts than Uber places on drivers.<sup>127</sup> The court adopted an expansive definition of “service employee” based on the Massachusetts Attorney General’s interpretive guidance that classified taxi drivers as service employees.<sup>128</sup>

Uber’s value has skyrocketed and its business model has continued to evolve despite its legal setbacks.<sup>129</sup> Amidst orders to shut down in some jurisdictions, Uber has expanded in others.<sup>130</sup> In late 2014, Uber debuted its service in Vietnam, Indonesia, and Singapore and even plans to add rickshaws in India.<sup>131</sup> The fact that Uber continues to thrive despite its unsuccessful legal battles is a testament to the difficulties inherent in bringing technology-based sharing companies into compliance with existing laws.<sup>132</sup>

## 2. Airbnb as a Potential Joint Venture

In *New Yorkers Making Ends Meet in the Sharing Economy v. Airbnb*, plaintiffs and former Airbnb hosts argued that the relationship between hosts and Airbnb constituted a joint venture.<sup>133</sup> A joint venture is a partnership between two or more persons that is entered into for a special purpose or project—as opposed to a general partnership for all business purposes.<sup>134</sup> In a joint venture, the partners owe fiduciary duties to one another.<sup>135</sup> The four elements generally understood to establish a joint venture are an express or implied agreement, common purpose, shared profits and losses, and equal control over the project.<sup>136</sup> By applying these concepts, a joint venture gives rise to a reciprocal duty of loyalty—which would, as the plaintiffs argued, prevent Airbnb from making the decision to release private, sensitive host information without the host’s consent.<sup>137</sup>

In its defense, Airbnb countered that no such relationship existed between the company and its hosts as all four of the necessary elements had not been

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<sup>126</sup> See *id.* at \*6–7.

<sup>127</sup> See *id.* at \*2, 6–7; Terms of Service, *supra* note 34.

<sup>128</sup> Lavitman, 2015 BL 41190, at \*6.

<sup>129</sup> *Id.*

<sup>130</sup> See MacMillan et al., *supra* note 21.

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

<sup>132</sup> See Gans, *supra* note 15, at 44.

<sup>133</sup> See Plaintiff’s Memorandum of Law in Support of their Motion for a Preliminary Injunction at 5–6, *New Yorkers Making Ends Meet in the Sharing Economy v. Airbnb, Inc.*, No. 158526/2014 (N.Y. Sup. Ct. Sept. 1, 2014).

<sup>134</sup> See *Joint Venture*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>135</sup> See Plaintiff’s Memorandum of Law in Support of their Motion for a Preliminary Injunction, *supra* note 133, at 6.

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*



established.<sup>138</sup> Specifically, Airbnb cited case law holding that, because of the substantial duties and obligations required in a joint venture, the absence of any one element is fatal.<sup>139</sup> The company further argued that it was merely a facilitator and that the transfer of money cannot transform an ordinary business transaction into a fiduciary relationship.<sup>140</sup> The New York court did not rule on the matter, and the host plaintiffs have since withdrawn the case.<sup>141</sup> Although the New York court did not determine whether Airbnb is a joint venture for purposes of defining its liability, any court that does address this issue would require proof of all elements of a joint venture.<sup>142</sup> The *New Yorkers Making Ends Meet in the Sharing Economy* plaintiffs failed to elaborate on how any of these elements were satisfied in the context of an Airbnb-host relationship and, in particular, failed to demonstrate the element of equal control between the hosts and Airbnb.<sup>143</sup>

#### D. Mixed Reception of Airbnb in Europe

Airbnb listings in Europe make up more than 58% of the site's listings and feature over 500,000 properties across the continent.<sup>144</sup> In 2013, Hamburg, Germany amended its housing laws to legalize private, short-term rentals, but a number of European cities have placed restrictions on home sharing.<sup>145</sup> France passed new housing legislation in March 2014 that allows people nationwide to rent out their primary residence without requiring a license, but Paris has more restrictive laws regarding home sharing.<sup>146</sup> In the French capital, individuals are only permitted to rent out an investment property to short-term guests if they also rent an equivalent property to a permanent tenant.<sup>147</sup>

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<sup>138</sup> See Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction and in Support of Airbnb, Inc.'s Cross-Motion for Partial Dismissal, *supra* note 105, at 5–6.

<sup>139</sup> See *id.* at 5.

<sup>140</sup> See *id.* at 6.

<sup>141</sup> See Letter from Roberta A. Kaplan, Paul, Weiss, Rifkind, Wharton & Garrison LLP, to Hon. Jennifer Schechter, Supreme Court of the State of N.Y. (July 28, 2015) (on file with author).

<sup>142</sup> See *Learning Annex Holdings, LLC v. Whitney Educ. Grp., Inc.*, 765 F. Supp. 2d 403, 412 (S.D.N.Y. 2011).

<sup>143</sup> See Plaintiff's Memorandum of Law in Support of their Motion for a Preliminary Injunction, *supra* note 133, at 5–6.

<sup>144</sup> *Airbnb: Europe Is Largest Market but Engineers Will Stay in San Francisco*, TECHWORLD (Feb. 11, 2015), <http://www.techworld.com/startups/airbnb-europe-is-largest-market-but-engineers-will-stay-in-san-francisco-3597423> [<http://perma.cc/A64H-86UL>].

<sup>145</sup> David Hantman, *A Major Step Forward in Paris and France—Une Avancée Majeure en France*, AIRBNB PUBLIC POL'Y BLOG (Mar. 26, 2014), <http://publicpolicy.airbnb.com/major-step-forward-paris-france> [<http://perma.cc/DEN7-PU43>].

<sup>146</sup> See *id.*

<sup>147</sup> Elena Berton et al., *Europe Cracks Down on Airbnb, Other Room-Sharing Sites*, USA TODAY, (July 7, 2015), <http://www.usatoday.com/story/money/business/2015/07/06/europe-airbnb-room-sharing/29263881/> [<http://perma.cc/ATQ7-WU8S>].

Pursuant to recent laws, Airbnb began collecting tourist taxes on behalf of hosts in Amsterdam in February 2015.<sup>148</sup> The city's new "private vacation rental" category allows individuals to rent out space in their homes, so long as they meet certain criteria.<sup>149</sup> The host must be registered with the municipal authorities as residing at that address, must pay local and national tourist taxes, and can only house up to four guests at one time for a cumulative duration no greater than sixty days per year.<sup>150</sup> If applicable, the new regulations also advise—though do not require—homeowners to get permission from a homeowner's association.<sup>151</sup> A tenant who wishes to rent out space in his or her home on a temporary basis must obtain the homeowner's permission and will only be allowed to rent the space if his or her monthly rent exceeds €699.48.<sup>152</sup>

In July 2014, Airbnb was fined €30,000 in the Spanish region of Catalonia for breaching local laws that require any apartment rented to tourists to be registered with the Tourism Registry.<sup>153</sup> Local laws also prohibit renting rooms in private residences in the region, which includes the popular tourist destination of Barcelona.<sup>154</sup> Despite this setback for Airbnb, the Government of Catalonia, in October 2014, committed to study the sharing economy and potentially to devise new rules for home sharing.<sup>155</sup>

Under a new Berlin law that went into effect on May 1, 2014, residents wishing to rent to transient occupants must register with the municipal authorities.<sup>156</sup> An automatic two-year grace period began on the date of enactment for any homes that were already being rented on a transient basis.<sup>157</sup> The new law outlines an approval process whereby individual districts are given discretion

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<sup>148</sup> *Airbnb Collects Tourist Tax in Amsterdam*, DUTCH AMSTERDAM (last updated Feb. 22, 2015), <http://www.dutchamsterdam.nl/3326-no-amsterdam-airbnb-ban#note-3326-1> [<http://perma.cc/FY9Z-V49Z>].

<sup>149</sup> *Id.*; see *In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, AIRBNB, <https://www.airbnb.com/help/article/653> [<https://perma.cc/N6ME-N775>] (last visited Nov. 11, 2015).

<sup>150</sup> *See Particuliere Vakantieverhuur [Private Rental]*, GEMEENTE AMSTERDAM, <http://www.amsterdam.nl/wonen-leefomgeving/wonen/informatie/verhuren/particuliere/#uitsluitendverhuur-doorhoofdbewoner> [<http://perma.cc/5P6Q-HKT5>] (last visited Nov. 11, 2015).

<sup>151</sup> *Id.*

<sup>152</sup> *Airbnb Collects Tourist Tax in Amsterdam*, *supra* note 148.

<sup>153</sup> See Ashifa Kassam, *Airbnb Fined €30,000 for Illegal Tourist Lets in Barcelona*, GUARDIAN (Jul. 7, 2014), <http://www.theguardian.com/technology/2014/jul/07/airbnb-fined-illegal-tourist-lets-barcelona-catalonia> [<http://perma.cc/NCZ6-ESU9>].

<sup>154</sup> *See id.*

<sup>155</sup> David Hantman, *Historic Day for Home Sharing in San Francisco*, AIRBNB PUBLIC POLICY BLOG (Oct. 27, 2014), <http://publicpolicy.airbnb.com/historic-day-home-sharing-san-francisco> [<http://perma.cc/J4UE-AB6P>].

<sup>156</sup> *Zweckentfremdungsverbot-Gesetz [ZwVbG] [Law Prohibiting the Misuse of Living Space]*, promulgated Dec. 12, 2013, GESETZ- UND VERORDNUNGSBLATT BERLIN [GVBL.] at 2013 626, § 3 (Ger.), <http://gesetze.berlin.de/jportal/?quelle=jlink&query=WozwEntfrG+BE&psml=bsbeprod.psml&max=true> [<http://perma.cc/4QT5-YCEP>].

<sup>157</sup> *See id.* § 2(2).

to grant authorization for short-term rental on the condition that “overriding public interests or legitimate private interests outweigh the public interest in the conservation of the living space concerned or when through the creation of adequate alternative housing in exceptional cases the misused housing loss is compensated.”<sup>158</sup>

The relatively restrictive laws passed in Paris, Amsterdam, and Berlin signal that these cities are approaching short-term home sharing cautiously and purposefully.<sup>159</sup> The priority is not to collect taxes on what renters charge or even to eliminate the transient rental market altogether.<sup>160</sup> Instead, the European rules reflect a focus on ensuring that short-term rentals are moderate in length and that efforts are taken to minimize negative externalities.<sup>161</sup>

### *E. Regulations in the United States*

Jurisdictions in the United States also have been moving to regulate short-term housing, albeit with a focus on liability and tax remittance.<sup>162</sup> Airbnb claims that it has remitted more than \$5 million to local governments since it began collecting taxes.<sup>163</sup> Recent regulations in Airbnb’s hometown of San Francisco have implemented several restrictions that took effect in February 2015.<sup>164</sup> Residents who rent out their primary residence or rooms in their primary residence must have \$500,000 in liability insurance coverage, occupy the residence for at least 275 days of the year, obtain a business license, get a permit from the city, and maintain a residence free of building code violations.<sup>165</sup>

<sup>158</sup> *Id.* § 3(1), translated by author.

<sup>159</sup> *See id.*; *Particuliere Vakantieverhuur*, *supra* note 150; Hugh Schofield, *Short-Let Apartments Spark Paris Row as Airbnb Thrives*, BBC (Dec. 26, 2014) <http://www.bbc.com/news/world-europe-30580295> [<http://perma.cc/H5FQ-P9QC>].

<sup>160</sup> *See* Schofield, *supra* note 159.

<sup>161</sup> *See id.*

<sup>162</sup> *See In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, *supra* note 149.

<sup>163</sup> Hantman, *Working Together to Collect and Remit in Washington D.C. and Chicago, Illinois*, *supra* note 48; *see* Amina Elahi, *Airbnb to Begin Collecting Hotel Tax Feb. 15*, CHI. TRIB. (Jan. 30, 2015), <http://www.chicagotribune.com/bluesky/originals/chi-airbnb-chicago-taxes-bsi-20150130-story.html> [<http://perma.cc/7ELN-TWUD>].

<sup>164</sup> Patrick Hoge, *San Francisco Supervisors Vote to Legalize Airbnb*, S.F. BUS. TIMES (Oct. 7, 2014), <http://www.bizjournals.com/sanfrancisco/blog/2014/10/san-francisco-supervisors-give-okay-to-airbnb.html> [<http://perma.cc/UFH8-FK48>]; Press Release, Office of the Mayor, City & County of San Francisco, Mayor Lee Signs Legislation to Regulate Short-Term Residential Rentals In San Francisco (Oct. 27, 2014), <http://www.sfmayor.org/index.aspx?recordid=691&page=846> [<http://perma.cc/D43C-26FU>] [hereinafter San Francisco Press Release]; *see also In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, *supra* note 149.

<sup>165</sup> *See* Patrick Hoge, *Airbnb Opponents Promise Ballot Measure to Overturn New City Law*, S.F. BUS. TIMES (Nov. 24, 2014), <http://www.bizjournals.com/sanfrancisco/blog/2014/11/airbnb-david-chiu-ballot-measure-san-francisco.html> [<http://perma.cc/W5J9-88R5>]; San Francisco Press Release, *supra* note 164.

Soon after San Francisco's ordinance passed by a seven-to-four vote, Airbnb announced that it would start providing secondary insurance coverage to its hosts throughout the United States at no cost.<sup>166</sup>

In August 2014, Portland, Oregon legalized short-term rentals in single-family homes and introduced a number of mandatory regulations, which were subsequently amended in January 2015 to help enforce the newly adopted regulations.<sup>167</sup> Notably, the Portland City Council voted to amend the definition of hotel to include any "house, duplex, condominium, multi-dwelling structure, trailer home, [and] houseboat" rented for fewer than thirty days.<sup>168</sup> Chicago and Washington, D.C. began collecting hotel taxes from Airbnb in February 2015.<sup>169</sup> In Washington, D.C., the revenue generated from Airbnb reservations will go towards a convention center fund and the District's general fund to support services such as the fire and police departments.<sup>170</sup>

On its own initiative, Airbnb will automatically collect the hotel or occupancy taxes from its users in specific markets and then pay the city the taxes owed in regular lump sums.<sup>171</sup> This new company policy, however, may put Airbnb at a disadvantage when compared to other short-term home sharing companies, such as Vacation Rentals by Owner, if the practice does not catch on among its competitors or through prompt legislative changes.<sup>172</sup>

Nashville, Tennessee approved regulations for Airbnb on February 26, 2015.<sup>173</sup> The approved ordinance creates a new classification called "short-term

<sup>166</sup> See Hoge, *San Francisco Supervisors Vote to Legalize Airbnb*, *supra* note 164; Ron Lieber, *A Liability Risk for Airbnb Hosts*, N.Y. TIMES (Dec. 5, 2014), <http://www.nytimes.com/2014/12/06/your-money/airbnb-offers-homeowner-liability-coverage-but-hosts-still-have-risks.html> [<http://perma.cc/MZ5K-8VT8>].

<sup>167</sup> See PORTLAND, OR., ZONING CODE ch. 33.207; Portland, Or., Amend Transient Lodgings Tax to Add Definitions and Clarify Duties for Operators for Short-Term Rental Locations (Jan. 14, 2015), available at <http://media.oregonlive.com/front-porch/other/Short-term%20rental%20ordinance.pdf> [<http://perma.cc/7AD5-Z6VQ>] [hereinafter Portland Ordinance: Transient Lodgings Tax] (amending PORTLAND, OR., CODE tit. 6, ch. 6.04); see also *In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, *supra* note 149.

<sup>168</sup> Portland Ordinance: Transient Lodgings Tax, *supra* note 167, at 3.

<sup>169</sup> See Emily Badger, *Airbnb Is About to Start Collecting Hotel Taxes in More Major Cities, Including Washington*, WASH. POST (Jan. 29, 2015), <http://www.washingtonpost.com/blogs/wonk-blog/wp/2015/01/29/airbnb-is-about-to-start-collecting-hotel-taxes-in-more-major-cities-including-washington> [<http://perma.cc/VEJ5-UX2Y>]; Elahi, *supra* note 163.

<sup>170</sup> See Badger, *supra* note 169.

<sup>171</sup> See David Hantman, *Working Together on New Proposals in Chicago*, AIRBNB PUBLIC POL'Y BLOG (Nov. 11, 2014), <http://publicpolicy.airbnb.com/working-together-new-proposals-chicago> [<http://perma.cc/Z38E-BQJL>].

<sup>172</sup> See Badger, *supra* note 169.

<sup>173</sup> Nashville, Tenn., Ordinance BL2014-951 (Feb. 26, 2015), available at [http://www.nashville.gov/mc/ordinances/term\\_2011\\_2015/bl2014\\_951.htm](http://www.nashville.gov/mc/ordinances/term_2011_2015/bl2014_951.htm) [<http://perma.cc/WL9G-8FYB>] [hereinafter Nashville Ordinance] (amending NASHVILLE, TENN., METRO. CODE 6.28); Joey Garrison, *Rules Aimed at Airbnb Home Rentals Advance*, TENNESSEAN (Feb. 3, 2015), <http://www.tennessean.com/story/news/local/davidson%20/2015/02/03/rules-aimed-at-airbnb-home-rentals-advance/22835727> [<http://perma.cc/VA9Y-38X4>].

rental property” and will require operators of short-term rental properties to be at least twenty-one years old, receive an annual permit, and provide proof of liability insurance coverage.<sup>174</sup> Nashville’s ordinance imposes extensive regulations on home sharing in the city by allowing no more than four sleeping rooms to be rented at a time, limiting stays to thirty days or fewer, limiting the number of guests to two per sleeping room, and prohibiting food service.<sup>175</sup> It also restricts signage, noise, and parking associated with the short-term stay.<sup>176</sup> The swift approval of this regulation followed a decision in November 2014 by Nashville Mayor Karl Dean to begin collecting hotel tax revenue from Airbnb hosts.<sup>177</sup>

### F. Investigation in New York City

In addition to the cities that have begun to impose specific restrictions on short-term home sharing, New York City is currently assessing whether Airbnb should be required to pay hotel tax and whether its operations violate various housing laws.<sup>178</sup> The City of New York estimates that it is owed over \$33 million in outstanding hotel room occupancy taxes since the company started operating in the city in 2010.<sup>179</sup> According to a study commissioned by Airbnb, however, the accommodations sharing platform was responsible for generating an estimated \$768 million in economic activity in New York City in 2014 alone.<sup>180</sup>

Airbnb claims that inexpensive lodging and increased access to accommodations in areas less frequented by tourists have helped stimulate the local economy.<sup>181</sup> Airbnb guests stay longer, on average, than tourists staying in hotels and are more likely to return on later trips.<sup>182</sup> Airbnb projected that New

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<sup>174</sup> Nashville Ordinance, *supra* note 173.

<sup>175</sup> *See id.*

<sup>176</sup> *See id.*

<sup>177</sup> Garrison, *supra* note 173.

<sup>178</sup> Streitfeld, *supra* note 12.

<sup>179</sup> *See* Ryan Lawler, *As It Seeks New Regulations in NY, Airbnb Estimates It Would Collect \$65 Million in Taxes There*, TECHCRUNCH (Jan. 16, 2015), <http://techcrunch.com/2015/01/16/airbnb-65-million-in-ny/> [<http://perma.cc/X46D-GP99>]. This conservative estimate of the back hotel occupancy taxes owed is based on data the New York State Attorney’s General Office received from Airbnb spanning 2010 through 2014. *Id.*

<sup>180</sup> Hantman, *Working Together for Home Sharing in New York City*, *supra* note 3; Lawler, *supra* note 179 (citing letter from David Hantman to regulators in New York).

<sup>181</sup> *See* Hantman, *Working Together for Home Sharing in New York City*, *supra* note 3; Mike Orgill, *Update from Singapore*, AIRBNB PUB. POL’Y BLOG (Feb. 1, 2015), <http://publicpolicy.airbnb.com/update-singapore/> [<http://perma.cc/ELB3-TL3T>].

<sup>182</sup> *See* Press Release, Airbnb, *New Study: Airbnb Community Contributes \$175 Million to Barcelona’s Economy*, <https://www.airbnb.com/press/news/new-study-airbnb-community-contributes-175-million-to-barcelona-s-economy> [<https://perma.cc/LS6K-JQRS>] (last visited Nov. 11, 2015); Press Release, City of Amsterdam, *Amsterdam and Airbnb Sign Agreement on Home Sharing and Tourist Tax* (Dec. 18, 2014), <http://iamsterdam.com/en/media-centre/city-hall/press-releases/2014-press-room/amsterdam-airbnb-agreement> [<http://perma.cc/3YN5-2MSF>]; Lawler, *supra* note 179. In

York City would lose out on \$65 million in potential tourism-related tax revenue in 2015 if it were to shut down the home-sharing site altogether.<sup>183</sup>

The situation in New York is unique, however, because the city has a high number of strict co-ops and subsidized housing units in areas of high rent.<sup>184</sup> A September 2014 opinion poll revealed sharp divisions among New Yorkers about companies like Airbnb.<sup>185</sup> Fifty-six percent of city residents believe they should be allowed to rent rooms to strangers like a hotel.<sup>186</sup> A Manhattan Housing Court judge, however, ruled in February 2015 that rent-stabilized tenants cannot profit from their reduced rent units by renting out on a short-term basis on websites such as Airbnb.<sup>187</sup>

In May 2014, New York State Attorney General Eric Schneiderman issued a subpoena to Airbnb to investigate the company for potential illegal rentals and for failure to pay required state and local taxes.<sup>188</sup> Concerned that the government would go after them instead of or in addition to the company, Airbnb hosts filed an anonymous suit against Airbnb in which they collectively referred to themselves as “New Yorkers Making Ends Meet in the Sharing Economy.”<sup>189</sup> They argued that Airbnb had no contractual right to release any information to the Attorney General and that it was merely trying to “protect itself by using the Plaintiffs as sacrificial lambs[.]”<sup>190</sup> The May 2014 subpoena was quashed as overbroad, but the company reached an agreement with the Attorney General to release limited information, giving the Attorney General

Amsterdam, for example, about three-fourths of Airbnb listings in 2014 were located outside the Amsterdam neighborhoods where most hotels are located, demonstrating the company’s strength in the traditionally less touristy areas. Press Release, City of Amsterdam, *supra*.

<sup>183</sup> Hantman, *Working Together for Home Sharing in New York City*, *supra* note 3.

<sup>184</sup> See Press Release, Liz Krueger, Senator, N.Y. State Senate, Statement on Airbnb Subpoena Agreement (May 21, 2014), <http://www.nysenate.gov/press-release/statement-airbnb-subpoena-agreement> [<http://perma.cc/9F49-9BTH>].

<sup>185</sup> Streitfeld, *supra* note 12.

<sup>186</sup> *Id.*

<sup>187</sup> See Julia Marsh, *Rent-Stabilized Tenant Evicted After Cashing in on Airbnb*, N.Y. POST, (Feb. 20, 2015), <http://nypost.com/2015/02/20/rent-stabilized-tenants-who-peddle-their-pads-may-be-evicted/> [<http://perma.cc/C8V9-VAXX>]; Press Release, Liz Krueger, Senator, N.Y. State Senate & Jumaane D. Williams, Council Member, N.Y.C. Council, Joint Statement from Sen. Krueger and NYC Councilmember Williams on Manhattan Housing Court Ruling Against Airbnb Host (Feb. 20, 2015), <http://www.nysenate.gov/press-release/joint-statement-sen-krueger-and-nyc-councilmember-williams-manhattan-housing-court-rul> [<http://perma.cc/2YMF-SWC3>].

<sup>188</sup> *Airbnb, Inc. v. Schneiderman*, 989 N.Y.S. 2d 786, 788–89 (Sup. Ct., 2014); Press Release, Eric T. Schneiderman, Att’y Gen., N.Y. State Office of the Att’y Gen., A.G. Schneiderman Releases Report Documenting Widespread Illegality Across Airbnb’s NYC Listings; Site Dominated by Commercial Users (Oct. 16, 2014), <http://www.ag.ny.gov/press-release/ag-schneiderman-releases-report-documenting-widespread-illegality-across-airbnbs-nyc> [<http://perma.cc/V7NB-BAJK>] [hereinafter N.Y. A.G. Report Press Release].

<sup>189</sup> Complaint at 1–2, *New Yorkers Making Ends Meet in the Sharing Economy v. Airbnb, Inc.*, No. 158526/2014 (N.Y. Sup. Ct. Sept. 2, 2014).

<sup>190</sup> *Id.* at 8, 12.

one year to seek further motions based on the information.<sup>191</sup> On July 28, 2015, the *New Yorkers Making Ends Meet in the Sharing Economy* plaintiffs indicated they were on the brink of a “mutually acceptable resolution” with Airbnb, and the motion for a preliminary injunction was dismissed without prejudice on October 7, 2015.<sup>192</sup>

Using data received from Airbnb and affidavits from interested parties, the New York Attorney General’s Office issued an in-depth report (NYAG Report) in October 2014 highlighting the myriad property use, safety, and tax laws that Airbnb or its users potentially violate.<sup>193</sup> For example, the New York State Multiple Dwelling Law prohibits apartment rentals of fewer than thirty days unless a permanent resident is present during the rental period.<sup>194</sup> Additionally, depending on the length of stay and whether the home is owner-occupied, Airbnb rentals may be subject to the New York City Hotel Occupancy Tax and the city’s Unincorporated Business Tax.<sup>195</sup> The New York City Fire Department’s Chief of Fire Prevention also cautioned that transient residential occupancies are required to be designed, constructed, and operated in accordance with more stringent fire protection requirements than permanent residences because transient visitors are generally unfamiliar with the building layout and exits.<sup>196</sup> The risks of fire and personal safety are heightened when short-term occupancy is combined with overcrowding or obstructed passageways.<sup>197</sup>

The NYAG Report exposes concerns that private short-term rental units in New York City are not only serving as illegal hostels and hotels, but are also displacing long-term housing in thousands of apartments and significantly reducing the supply of affordable housing.<sup>198</sup> The report identified 12 buildings in the boroughs of Brooklyn and Manhattan that had at least 60% of their units dedi-

<sup>191</sup> *Airbnb v. Schneiderman*, 989 N.Y.S. 2d at 793; Letter from Clark Russell, Deputy Bureau Chief, Internet Bureau, N.Y. State Office of the Att’y Gen., to Belinda Johnson, Gen. Counsel, Airbnb, Inc. (May 20, 2014), [http://www.ag.ny.gov/pdfs/OAG\\_Airbnb\\_Letter\\_of\\_Agreement.pdf](http://www.ag.ny.gov/pdfs/OAG_Airbnb_Letter_of_Agreement.pdf) [<http://perma.cc/PB5T-DV87>] (Agreement Regarding Compliance with Subpoena).

<sup>192</sup> Letter from Roberta A. Kaplan, *supra* note 141; *see* Decision and Order on Motion for Preliminary Injunction/Temporary Restraining Order, *New Yorkers Making Ends Meet in the Sharing Economy v. Airbnb, Inc.*, No. 158526/2014 (N.Y. Sup. Ct. Oct. 7, 2015).

<sup>193</sup> ATT’Y GEN. AIRBNB REPORT, *supra* note 34, at 18–19.

<sup>194</sup> *See* N.Y. MULT. DWELL. § 4 (McKinney 2015); ATT’Y GEN. AIRBNB REPORT, *supra* note 34, at 18. The stated purposes of the Multiple Dwelling Law are to protect inhabitants, ensure the proper safety and fire codes, and protect permanent residents from enduring the inconvenience of hotel occupancy in their buildings. *See* N.Y. MULT. DWELL. § 2.

<sup>195</sup> ATT’Y GEN. AIRBNB REPORT, *supra* note 34, at 19.

<sup>196</sup> *See id.* at 23. Among the more stringent requirements for transient occupancies are provisions for portable fire extinguishers, automatic sprinklers, photoluminescent exit path markings, a fire safety and evacuation plan, fire safety director, and fire safety-trained building staff. *See id.* at 24–25.

<sup>197</sup> *See* Complaint at 7, 14, *City of New York v. NYC Midtown LLC*, No. 450151/2015 (N.Y. Sup. Ct. Feb. 15, 2015).

<sup>198</sup> ATT’Y GEN. AIRBNB REPORT, *supra* note 34, at 3.

cated to private short-term rentals, suggesting they operated as de facto hotels.<sup>199</sup> There is a lot at stake for Airbnb and its hosts in New York City, as bookings in Manhattan alone generated a total of \$338 million for hosts from January 2010 through June 2014.<sup>200</sup> The revenues Airbnb collected from units that were individually booked for more than half the year increased thirty-seven-fold in a span of 3 years, from \$270,000 in 2010 to \$10 million in 2013.<sup>201</sup>

Defending their position against allegations that Airbnb undermines affordable housing are a number of Airbnb hosts who claim that renting out space in their homes allows them to make their monthly rent or mortgage payments.<sup>202</sup> This view that Airbnb is a lifeline for struggling homeowners and tenants reflects the origins of the company, which began as a remedy for recent graduates struggling to make rent payments.<sup>203</sup> What started as a way for two young San Francisco transplants to solve their own financial problem became an experiment that inspired the launch of Airbnb.<sup>204</sup>

### III. ANALYSIS

#### *A. Airbnb Is Not Immune from Liability*

##### 1. The Airbnb-Host Relationship Is Not Captured by the Traditional Legal Frameworks

Prosumers who use the services of sharing-economy companies often are able to evade liability because of the difficulty in applying laws—which were written for the offline world—to virtual spaces.<sup>205</sup> In suits brought against Uber, the company continues to reiterate its lack of operational control over users of its smartphone application.<sup>206</sup> Uber also emphasizes that it does not provide transportation services directly to the public; purchase or lease vehicles; plan service routes; or hire, fire, or otherwise manage the people who log onto its

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<sup>199</sup> *Id.* at 12. Similarly, in Berlin, a citywide increase in rent prices has been blamed on a massive increase in Airbnb rentals. Carole Cadwalladr, *It's Difficult to Resist Airbnb*, GUARDIAN (Feb. 13, 2015), <http://www.theguardian.com/commentisfree/2015/feb/13/difficult-to-resist-airbnb> [<http://perma.cc/U4FP-TZYQ>].

<sup>200</sup> ATT'Y GEN. AIRBNB REPORT, *supra* note 34, at 15.

<sup>201</sup> *Id.* at 13.

<sup>202</sup> See Logan, *supra* note 41.

<sup>203</sup> See Logan, *supra* note 41. In 2008, two recent Rhode Island School of Design graduates who had relocated to San Francisco were struggling to make rent. See Geron, *supra* note 3; Chesky, *supra* note 29. An international design conference was coming to town and all hotels in the area were sold out, so the roommates came up with the idea to house conference attendees on airbeds on their floor. See Geron, *supra* note 3; Chesky, *supra* note 29. They advertised by setting up the aptly named website Airbedandbreakfast.com. See Geron, *supra* note 3.

<sup>204</sup> See Geron, *supra* note 3.

<sup>205</sup> See Uber Motion to Dismiss, *supra* note 5, at 10.

<sup>206</sup> See *id.* at 3, 14.



app.<sup>207</sup> The company further argues that its lack of a physical location causes its activities, which take place in “virtual environments[,]” to not be subject to laws of local jurisdictions or even federal laws.<sup>208</sup>

The unworkability of certain laws as applied to technology-based peer-to-peer companies arose in *Ramos v. Uber Technologies, Inc.*, where the company contended that it could not alter its smartphone application to make accommodations for mobility-impaired users.<sup>209</sup> Because Uber drivers who use the app to search for potential riders are beyond the control of Uber, the company claimed that it could not be held liable when those drivers refused to offer rides to individuals in wheelchairs who are statutorily entitled to special accommodations under the American with Disabilities Act.<sup>210</sup> Uber maintained that the statute did not apply to the ridesharing company, claiming that Uber was not a “taxi” service as defined in the statute.<sup>211</sup> In essence, the company’s distance from these operational activities creates a shield, it argues, that permits it to escape liability.<sup>212</sup> The District Court for the Western District of Texas was not convinced, finding that the requirements of having a valid driver’s license, car insurance, clean driving record, and four-door vehicle all point to some level of control over Uber drivers.<sup>213</sup> The court also commented that referring to its drivers as independent contractors makes it appear “disingenuous for Uber to protest that it does not and cannot exert any control over its drivers.”<sup>214</sup> Similarly, the Massachusetts Superior Court recognized that users of the sharing economy can sometimes more closely resemble employees than independent contractors of the company.<sup>215</sup>

Nonetheless, the reasoning in *Ramos* suggests that Airbnb may not exercise sufficient control over its users because the requirements to become an Airbnb host are substantially less specific and demanding than those to become an Uber driver.<sup>216</sup> Uber drivers ultimately determine who they let into their vehicle just as hosts control who can book their listing, but unlike Uber drivers

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<sup>207</sup> *See id.*

<sup>208</sup> *Id.* at 3.

<sup>209</sup> *See id.* at 4.

<sup>210</sup> *See* 42 U.S.C. § 12184(a) (2014); Uber Motion to Dismiss, *supra* note 5, at 14.

<sup>211</sup> Uber Motion to Dismiss, *supra* note 5, at 9–10.

<sup>212</sup> *See id.* at 3, 9–10.

<sup>213</sup> *See Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, 2015 WL 758087, at \*12–13 (W.D. Tex. Feb. 20, 2015).

<sup>214</sup> *Id.* at \*13.

<sup>215</sup> *See Lavitman v. Uber Technologies, Inc. et al.*, No. 129442, 2015 BL 41190, at \*6–7 (Mass. Sup. Ct. Jan. 26, 2015).

<sup>216</sup> *See* Uber Motion to Dismiss, *supra* note 5, at 3; Terms of Service, *supra* note 34. Hosts can only have one active Airbnb account at a time and must be 18 or older to create an account. *See* Terms of Service, *supra* note 34. Creating a host listing entails answering a series of questions about the property and the host as well as providing a valid physical address. *See id.* Although there is no explicit approval process, Airbnb maintains the right to remove a listing for any reason. *See id.*

who are subject to pricing determined by the company, Airbnb hosts determine the cost at which a guest can stay overnight.<sup>217</sup>

In comparison to Airbnb, Uber appears to exert more control over its users.<sup>218</sup> The strongest example of this heightened control is the background check that drivers must pass to be accepted by Uber.<sup>219</sup> Airbnb administers no comparable fitness test or screening.<sup>220</sup> This discrepancy may be attributable to the type of service being provided because driving and the taxicab industry are both highly regulated, whereas hospitality regulations are often relaxed or otherwise inapplicable to home swapping or home sharing.<sup>221</sup> The price scheme that Uber employs also distinguishes it from Airbnb's business model.<sup>222</sup> Uber sets prices for rides that include a base fee and an amount per distance, which is based on supply and demand at the time the ride request is made.<sup>223</sup> In contrast, Uber drivers do not have a direct input into the price determination; Airbnb hosts alone determine the price they wish to charge and Airbnb collects a portion of the total amount as its service fee.<sup>224</sup>

Uber's emphasis on its lack of a physical location is beside the point because functionally, its software affects real-world interactions.<sup>225</sup> Sharing economies have real effects on commerce and, for better or worse, on the people who participate in those transactions.<sup>226</sup> Additionally, in the case of Airbnb, there are effects on people wholly outside of the transaction—including neighbors and landlords who endure transient occupants and members of the community who suffer when the housing market is adversely affected by the systematic conversion of residential units to transient use.<sup>227</sup>

Moreover, the Airbnb-host relationship is not a joint venture.<sup>228</sup> While the relationship arguably meets the first three elements—express or implied agreement, common purpose that the group intends to carry out, and shared profits and losses—there is no equal control over the project.<sup>229</sup> There is an imbalance of the rights and responsibilities between the company and the host, with the host having a greater degree of control over the renting of the property

<sup>217</sup> See Uber Motion to Dismiss, *supra* note 5, at 3; Terms of Service, *supra* note 34.

<sup>218</sup> See Ramos, 2015 WL 758087, at \*12–13; Terms of Service, *supra* note 34.

<sup>219</sup> See Ramos, 2015 WL 758087, at \*12.

<sup>220</sup> See Terms of Service, *supra* note 34.

<sup>221</sup> See N.Y. MULT. DWELL. § 4(8)(a); Barro, *supra* note 117.

<sup>222</sup> See Dan Kedmey, *This Is How Uber's 'Surge Pricing' Works*, TIME (Dec. 15, 2014), <http://time.com/3633469/uber-surge-pricing> [<http://perma.cc/657A-3B6T>]; Terms of Service, *supra* note 34.

<sup>223</sup> See Kedmey, *supra* note 222.

<sup>224</sup> See *id.*; Terms of Service, *supra* note 34.

<sup>225</sup> See Uber Motion to Dismiss, *supra* note 5, at 10.

<sup>226</sup> See *id.*

<sup>227</sup> See Kassam, *supra* note 153.

<sup>228</sup> See Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction and in Support of Airbnb, Inc.'s Cross-Motion for Partial Dismissal, *supra* note 105, at 5.

<sup>229</sup> See *Joint Venture*, BLACK'S LAW DICTIONARY (10th ed. 2014).

itself.<sup>230</sup> Thus, the elements for a joint venture are not satisfied.<sup>231</sup> Given that the independent contractor and joint venture relationships emphasize control, alternative means of imposing liability that likewise focus on control should be considered.<sup>232</sup>

## 2. Control in Airbnb-Host Relationships Does Not Preclude Airbnb from Liability

Precedents set by European governments may inform the direction that U.S. cities will take as the market presence of sharing economies continues to increase.<sup>233</sup> Despite the difficulty of regulating Airbnb through traditional legal frameworks, there ought to be parameters within which it must operate.<sup>234</sup>

Airbnb's involvement in its home-sharing listings is increasingly evolving to the level of control necessary to give rise to liability by "contribut[ing] materially to the alleged illegality of the conduct."<sup>235</sup> In some U.S. cities, Airbnb has started to help hosts meet their tax obligations by including applicable hotel or tourist taxes into the price of listings.<sup>236</sup> Collecting and remitting taxes on behalf of hosts also represents a greater degree of control than Airbnb had previously exhibited on pricing, making Airbnb more than a "passive transmitter of information provided by others[.]"<sup>237</sup> This move also brings Airbnb's practices closer to those of Uber, which some courts have determined exerts a level of control sufficient to establish liability for complying with applicable laws.<sup>238</sup> Perhaps most importantly, remitting taxes on behalf of its users serves as an indicator of Airbnb's essential role in the transient housing market—not just as a detached facilitator but as an indispensable participant in the transaction.<sup>239</sup>

As further evidence of Airbnb's growing control over its hosts and users, its website currently provides detailed information about the various re-

<sup>230</sup> See Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction and in Support of Airbnb, Inc.'s Cross-Motion for Partial Dismissal, *supra* note 105, at 6.

<sup>231</sup> See *id.* at 5–6.

<sup>232</sup> See *Ramos*, 2015 WL 758087, at \*13; Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction and in Support of Airbnb, Inc.'s Cross-Motion for Partial Dismissal, *supra* note 105, at 5–6.

<sup>233</sup> See *Rustad*, *supra* note 76, at 200.

<sup>234</sup> See *Dickerson & Hinds-Radix*, *supra* note 40, at 49–50.

<sup>235</sup> *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1161–63, 1168 (9th Cir. 2008).

<sup>236</sup> See *Hantman*, *Working Together to Collect and Remit in Washington D.C. and Chicago, Illinois*, *supra* note 48.

<sup>237</sup> *Roommates.com, LLC*, 521 F.3d at 1166; see *Hantman*, *Working Together to Collect and Remit in Washington D.C. and Chicago, Illinois*, *supra* note 48.

<sup>238</sup> See *Ramos*, 2015 WL 758087, at \*12–13.

<sup>239</sup> See Complaint at 9, *New Yorkers Making Ends Meet in the Sharing Economy v. Airbnb, Inc.*, No. 158526/2014 (N.Y. Sup. Ct. Sept. 2, 2014).

strictions, rules, and taxes that may apply to listings in over forty U.S. cities.<sup>240</sup> Airbnb is on notice of the different rules that affect listings and could modify its software to detect when a specific location is subject to a particular license requirement or tax obligation and comply accordingly.<sup>241</sup> Because hosts must furnish a physical address when creating a listing, Airbnb is aware of the location of that particular listing.<sup>242</sup> At the host's request, an Airbnb representative can personally go to the host's home to take photos of the space, which are then labeled as an "Airbnb.com Verified Photo" on the listing.<sup>243</sup> There is also a mechanism for users to verify their identity by submitting a photograph of a government-issued ID, which is displayed as "User Verified" on the listing.<sup>244</sup> These verification methods represent ways in which Airbnb is closing the control gap between the company and the host.<sup>245</sup>

From a technological perspective, remitting taxes shows that Airbnb is capable of easily and effectively ensuring that its hosts comply with tax obligations arising from the transactions conducted on Airbnb's platform.<sup>246</sup> Courts consider technological feasibility when determining whether it is appropriate for an ISP to be liable for content appearing online.<sup>247</sup> For example, in jurisdictions that only permit residents to rent to transient guests for a limited number of days per year, Airbnb's past adaptations indicate that it could be technologically feasible for Airbnb to implement reasonable controls that prevent hosts from exceeding their lawfully permitted annual allotment.<sup>248</sup>

Beyond technological feasibility, Airbnb's level of control on the content of its site determines whether the company is entitled to § 230 immunity.<sup>249</sup> Because the ISP is liable for speech that it helps to create under § 230, Airbnb may be exposed to liability for content posted to its home-sharing platform.<sup>250</sup> Airbnb elicits information about the properties listed on its website by asking

<sup>240</sup> See *Responsible Hosting*, AIRBNB, *supra* note 42.

<sup>241</sup> See *Ctr. for Democracy & Tech. v. Pappert*, 337 F.Supp. 2d 606, 651 (2004) (finding that the lack of an economical and readily available alternative precluded the ISP from liability); *Responsible Hosting*, AIRBNB, *supra* note 42.

<sup>242</sup> See Terms of Service, *supra* note 34.

<sup>243</sup> *Id.*

<sup>244</sup> *Verify Your ID*, AIRBNB, <https://www.airbnb.com/verify#step/offline> [<https://perma.cc/HN8L-2ZN5>] (last visited Nov. 11, 2015); see *What Is Verified ID?*, AIRBNB, <https://www.airbnb.com/help/article/450/what-is-verified-id> [<https://perma.cc/P9QW-QMCX>] (last visited Nov. 11, 2015).

<sup>245</sup> See *Roommates.com, LLC*, 521 F.3d at 1161–63, 1166; Terms of Service, *supra* note 34; AIRBNB, *Verify Your ID*, *supra* note 244; AIRBNB, *What Is Verified ID?*, *supra* note 244.

<sup>246</sup> See *Pappert*, 337 F.Supp. 2d at 651; Hantman, *Working Together to Collect and Remit in Washington D.C. and Chicago, Illinois*, *supra* note 48.

<sup>247</sup> See *Pappert*, 337 F.Supp. 2d at 651.

<sup>248</sup> See *id.*; Terms of Service, *supra* note 34.

<sup>249</sup> See 47 U.S.C. § 230(c); *Roommates.com, LLC*, 521 F.3d at 1162, 1168, 1172.

<sup>250</sup> See *Roommates.com, LLC*, 521 F.3d at 1165–66.

hosts to complete listing profiles.<sup>251</sup> Generally, the host can free-write to describe the listing.<sup>252</sup> Airbnb encourages hosts to “[h]ighlight what makes your listing welcoming so that it stands out to guests who want to stay in your area.”<sup>253</sup> Thus, the host inputs the detailed information at the direction of Airbnb—much like the homeowner in *Roommates.com* listed his home at the direction of the website.<sup>254</sup>

In addition to the free-writing spaces, Airbnb also provides drop-down menus that ask for information such as number of bedrooms available, room type, number of guests that can be accommodated, and property type.<sup>255</sup> The host determines the price, but Airbnb generates a “price tip” based on the listing’s “features, location, amenities, booking history, availability, and seasonal supply and demand” in the area.<sup>256</sup> Airbnb’s suggested price appears next to the space where the host fills in the price and can be adjusted according to the length of stay.<sup>257</sup> Airbnb’s involvement in pricing and in soliciting specific information from its hosts constitutes partial development of the content that should preclude it from invoking § 230 immunity from liability.<sup>258</sup>

### 3. Externalities Call for Either Public or Private Regulation of Airbnb

By their very nature, Airbnb transactions have far-reaching and potentially long-lasting consequences on parties outside of the transaction.<sup>259</sup> The proliferation of home sharing has caused the permanent housing stock to dwindle in recent years—especially in relatively expensive cities with both a high de-

<sup>251</sup> AIRBNB, <https://www.airbnb.com> [<https://perma.cc/PHJ2-SRQY>] (follow “Become a Host” hyperlink to create an Airbnb account; then follow “Manage Listings” hyperlink; then follow “Add New Listings”) (last visited Nov. 11, 2015).

<sup>252</sup> *Id.*

<sup>253</sup> AIRBNB, <https://www.airbnb.com> [<https://perma.cc/PHJ2-SRQY>] (follow “Manage Listings” hyperlink; then follow “Add New Listings” hyperlink; then navigate through the various steps for creating a listing; then follow the “Description” hyperlink) (last visited Nov. 11, 2015).

<sup>254</sup> See *Roommates.com, LLC*, 521 F.3d at 1165–66.

<sup>255</sup> AIRBNB, <https://www.airbnb.com> [<https://perma.cc/PHJ2-SRQY>] (follow “Become a Host” hyperlink to create an Airbnb account; then follow “Manage Listings” hyperlink; then follow “Add New Listings” hyperlink; then navigate through the various steps for creating a listing) (last visited Nov. 11, 2015).

<sup>256</sup> AIRBNB, <https://www.airbnb.com> [<https://perma.cc/PHJ2-SRQY>] (follow “Manage Listings” hyperlink; then follow “List Your Space” hyperlink; then follow “Pricing” hyperlink) (last visited Nov. 11, 2015).

<sup>257</sup> *See id.*

<sup>258</sup> See *Roommates.com, LLC*, 521 F.3d at 1164–66; AIRBNB, <https://www.airbnb.com> [<https://perma.cc/PHJ2-SRQY>] (follow “Manage Listings” hyperlink; then follow “List Your Space” hyperlink; then follow “Pricing” hyperlink) (last visited Nov. 11, 2015).

<sup>259</sup> See Arun Sundararajan, Professor, Stern Sch. of Bus., N.Y. Univ., *The Interplay Between Competition, Consumer Protection, and Regulation: Policy Perspectives*, in *Federal Trade Commission Workshop: The “Sharing” Economy: Issues Facing Platforms, Participants, and Regulators*, *supra* note 8, at 167–68.

mand for long-term housing and a high volume of tourism.<sup>260</sup> In such markets, homeowners or tenants find it profitable to operate as short-term transient housing.<sup>261</sup> Long-term housing units are being taken out of the market due to the higher profit margins associated with Airbnb and the ease with which short-term vacancies can be filled.<sup>262</sup> In New York City, this is particularly precarious because the housing market is delicate and a substantial proportion of the market is comprised of strict co-ops, rent stabilized units, and other similarly limited housing schemes.<sup>263</sup> The emergence of platforms that simplify home sharing and make the practice so rampant must be met with private or public regulation that accounts for the effects created by such platforms.<sup>264</sup>

### B. Recommended Regulations

Some European cities have been faster to respond to home sharing's externalities than their U.S. counterparts.<sup>265</sup> Regulations passed in cities such as Amsterdam and Berlin recognize the quality of life and even the safety issues of having transient guests among permanent residents.<sup>266</sup> While many regulations in European jurisdictions try to remedy the permanent housing loss, regulations passed in major U.S. cities thus far have focused on mandating insurance coverage and collecting tourist taxes of would-be hotel guests.<sup>267</sup>

The importance of preserving the tourist taxes from transient visitors should not be ignored, but it also should not overshadow the other important aspects of regulating Airbnb.<sup>268</sup> As long as Airbnb stays are displacing hotel stays, there is a loss of potential hotel or tourist tax revenue that would otherwise flow to the local governments to support affordable housing and municipi-

<sup>260</sup> See Schofield, *supra* note 159.

<sup>261</sup> See *id.*

<sup>262</sup> See *id.*

<sup>263</sup> See Press Release, Liz Krueger (May 20, 2014), *supra* note 184; Press Release, Liz Krueger, Senator, N.Y. State Senate, A Response to Airbnb's "Three Principles" (Oct. 3, 2013), <http://www.nysenate.gov/newsroom/press-releases/liz-krueger/behalf-regular-new-yorkers-sen-krueger-responds-airbnb-three> [<http://perma.cc/38KT-Y7BY>].

<sup>264</sup> See Press Release, Liz Krueger (Oct. 3, 2013), *supra* note 263.

<sup>265</sup> See Schofield, *supra* note 159; Alice Speri, *Airbnb Will Probably Get You Evicted and Priced Out of the City*, VICE (Apr. 24, 2014), <https://news.vice.com/article/airbnb-will-probably-get-you-evicted-and-priced-out-of-the-city> [<https://perma.cc/N6RA-PQ3Q>].

<sup>266</sup> See Schofield, *supra* note 159; *Airbnb Collects Tourist Tax in Amsterdam*, *supra* note 148; *Particuliere Vakantieverhuur*, *supra* note 150.

<sup>267</sup> See Schofield, *supra* note 159; Hantman, *Working Together to Collect and Remit in Washington D.C. and Chicago, Illinois*, *supra* note 48. Compare ZwVbG [Law Prohibiting the Misuse of Living Space], promulgated Dec. 12, 2013, GVBl. at 2013 626, § 3 (permitting transient occupancy only when it is in the public interest) with Portland Ordinance: Transient Lodgings Tax, *supra* note 167 (imposing a tax on transient occupancy without further restrictions on short-term rentals).

<sup>268</sup> See Speri, *supra* note 265.

pal improvement projects.<sup>269</sup> Thus, apart from units being removed from the permanent housing stock to be used for transient guests, the reduced proceeds from tourist taxes further exacerbates the plight in these cities.<sup>270</sup> The fact that such regulations on home sharing heretofore have been nonexistent, of course, is not a reason to stall their promulgation.<sup>271</sup> U.S. cities can and should look to European jurisdictions for methods in which Airbnb can coexist with local regulations in a way that is beneficial to the company, its users, and the residents affected by Airbnb's presence.<sup>272</sup>

Limiting the number of days per year that a location can serve as transient accommodations is an easily enforceable requirement that could help alleviate the loss of affordable permanent housing.<sup>273</sup> Because many cities already regulate transient stays longer than thirty consecutive days, formulating similar restrictions for short-term homestays is consistent with existing limitations.<sup>274</sup> To assist in assuring compliance with the annual limit and other applicable local rules, homeowners or tenants wishing to rent on a short-term basis should be required to annually register the property with local authorities.<sup>275</sup> In addition to facilitating compliance, registration would allow municipal authorities to keep track of the number and concentration of properties that are occupied by transient guests for part of the year.<sup>276</sup> The Airbnb website already is set up technologically to record the total duration of stays per listing because Airbnb logs the length of stays in order to collect guest fees and host fees from its users.<sup>277</sup>

<sup>269</sup> See *id.*; Vanessa Sindors, Senior Vice President and Head of Gov't Affairs, Am. Hotel & Lodging Ass'n, *The Interplay Between Competition, Consumer Protection, and Regulation: Business and Regulatory Views*, in *Federal Trade Commission Workshop: The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators*, *supra* note 8, at 136.

<sup>270</sup> Speri, *supra* note 265.

<sup>271</sup> See Dickerson & Hinds-Radix, *supra* note 40, at 49.

<sup>272</sup> See Rustad, *supra* note 76, at 200; see also City of Amsterdam, *Short Stay Policy*, <http://www.iamsterdam.com/en/local/live/housing/rental-property/shortstay> [<http://perma.cc/Z967-ATT8>] (last visited Nov. 11, 2015).

<sup>273</sup> See Speri, *supra* note 265; City of Amsterdam, *Short Stay Policy*, *supra* note 272.

<sup>274</sup> See, e.g., *Responsible Hosting*, *supra* note 42; PORTLAND, OR., ZONING CODE, *supra* note 167, ch. 33.207; Office of the City Treasurer, *Transient Occupancy Tax (TOT)/Tourism Marketing District (TMD)*, CITY OF SAN DIEGO, <http://www.sandiego.gov/treasurer/taxesfees/tot/index.shtml> [<http://perma.cc/466Z-NJP7>] (last visited Nov. 11, 2015).

<sup>275</sup> See e.g., ZwVbG [Law Prohibiting the Misuse of Living Space], promulgated Dec. 12, 2013, GVBl. at 2013 626, § 3; City of Amsterdam, *Short Stay Policy*, *supra* note 272.

<sup>276</sup> See ZwVbG [Law Prohibiting the Misuse of Living Space], promulgated Dec. 12, 2013, GVBl. at 2013 626, § 3; Garrison, *supra* note 173; City of Amsterdam, *Short Stay Policy*, *supra* note 272.

<sup>277</sup> See AIRBNB, <https://www.airbnb.com> [<https://perma.cc/PHJ2-SRQY>] (follow "Become a Host" hyperlink to create an Airbnb account; then follow "Manage Listings" hyperlink; then follow "List Your Space" hyperlink; then follow "Calendar" hyperlink) (last visited Nov. 11, 2015).

Amsterdam and Berlin are among the cities that already require registration for short-term stays.<sup>278</sup> Berlin has announced an approval process that would award short-term rental licenses when it is in the public interest to do so or when the loss of permanent housing is compensated.<sup>279</sup> Amsterdam currently allows residents to register their primary residence for short-term stays only if their monthly home payment exceeds €710.68.<sup>280</sup> Additionally, in Paris, there is no primary residence prerequisite for short-term rentals, but commercial renters must place a permanent rental on the market for every transient rental they have, which severely limits the use of Airbnb in the city.<sup>281</sup>

While these attempts at restoring balance in the housing market—such as the minimum monthly rent and the commercial renter obligations—are well-intentioned, they largely would go beyond the scope of Airbnb’s practical ability to monitor every host’s compliance.<sup>282</sup> Moreover, each regulation reflects the needs of the specific housing markets in particular cities and, as such, demonstrates that there is no one-size-fits-all model.<sup>283</sup>

The depletion of long-term permanent housing caused by Airbnb is unlikely to be addressed by deregulation or a framework self-regulated by Airbnb.<sup>284</sup> Actively addressing this issue would hinder the home-sharing economy and run counter to the interests of Airbnb and its shareholders.<sup>285</sup> Airbnb failed to take the lead on this issue, despite having the opportunity to do so, when it released the Airbnb Community Compact (the Compact) in November 2015, which outlined the company’s commitment to qualified cooperation in cities that embrace home-sharing policies.<sup>286</sup> In the Compact, Airbnb introduced its plan to start is-

<sup>278</sup> ZwVbG [Law Prohibiting the Misuse of Living Space], promulgated Dec. 12, 2013, GVBl. at 2013 626, § 3; City of Amsterdam, *Short Stay Policy*, *supra* note 272.

<sup>279</sup> ZwVbG [Law Prohibiting the Misuse of Living Space], promulgated Dec. 12, 2013, GVBl. at 2013 626, § 3.

<sup>280</sup> City of Amsterdam, *Short Stay Policy*, *supra* note 272.

<sup>281</sup> See Berton et al., *supra* note 147; Schofield, *supra* note 159.

<sup>282</sup> See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997); Berton et al., *supra* note 147.

<sup>283</sup> See, e.g., City of Amsterdam, *Short Stay Policy*, *supra* note 272 (expressing the desire to “enhance Amsterdam’s appeal as a business location” while not compromising quality of life for residents or “availability of affordable subsidised [sic] apartments”); Nashville Ordinance, *supra* note 173 (describing the Nashville legislation’s dual aims of “provid[ing] homeowners an opportunity to hold property in difficult economic circumstances or as an investment” and collecting hotel taxes from such properties “to promote travel and tourism”).

<sup>284</sup> See Matthew Daus, Partner, Windels, Marx, Lane & Mittendorf, Federal Trade Commission Workshop: The “Sharing” Economy: Issues Facing Platforms, Participants, and Regulators, *supra* note 8, at 126–27; David Hantman, Head of Global Pub. Pol’y, Airbnb, Federal Trade Commission Workshop: The “Sharing” Economy: Issues Facing Platforms, Participants, and Regulators, *supra* note 8, at 112, 114.

<sup>285</sup> See Speri, *supra* note 265.

<sup>286</sup> See Airbnb, *The Airbnb Community Compact*, AIRBNB PUB. POL’Y BLOG (Nov. 11, 2015), <http://publicpolicy.airbnb.com/compact/> [<http://perma.cc/Ry7P-LPRP>]; AIRBNB, THE AIRBNB COM-



suing annual Home Sharing Activity Reports in select cities, which will contain anonymous data designed to help public officials “craft fair, progressive rules” about home sharing.<sup>287</sup> While these reports will purportedly compile useful information on the geographic distribution of Airbnb listings and the average length of Airbnb stays, they will exclude any data on Airbnb’s effect on affordable housing, such as data on long-term housing units converted to short-term transient units or trends in average rent prices in cities with a sizable Airbnb presence.<sup>288</sup> In the Compact, Airbnb acknowledged the affordable housing problem that some cities face and pledged to “work . . . to prevent short-term rentals from impacting the availability of long-term rental housing by ensuring hosts agree to a policy of listing only permanent homes on a short-term basis.”<sup>289</sup> Without providing greater transparency or implementing practical changes to its website, however, Airbnb’s empty promise will not further the company’s stated goals of promoting the “policy needs of a particular city” or helping guarantee compliance with applicable laws.<sup>290</sup>

Restrictions that are overly burdensome on Airbnb are unlikely to be upheld in the United States.<sup>291</sup> Based on the § 230 safe harbor provision and related case law, Congress has expressed—and the courts have affirmed—an intent to embrace broad protections so that interactive computer services are not held liable for much online content.<sup>292</sup> It is important to recognize this motive when considering additional requirements to adopt from European jurisdictions, which are not limited by § 230 immunity.<sup>293</sup> Moreover, at the time it was enacted in 1996, § 230 reflected the desire to develop the fledgling Internet.<sup>294</sup> In the nearly twenty years since it has been in force, the safe harbor provision no longer serves its initial purpose.<sup>295</sup> In the absence of legislative correction, the present interpretation of § 230 should reflect the Internet’s rapid development and stop protecting content that emphatically violates local or federal laws.<sup>296</sup> Today, the Internet and technology-based applications play an unprecedented role in the daily lives of a large portion of the population and have in turn transformed the role of pub-

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MUNITY COMPACT 2 (Nov. 11, 2015), available at <http://publicpolicy.airbnb.com/wp-content/uploads/2015/11/Airbnb-Community-Compact.pdf> [<http://perma.cc/HU86-LU6G>].

<sup>287</sup> See AIRBNB, THE AIRBNB COMMUNITY COMPACT, *supra* note 286, at 3.

<sup>288</sup> See *id.*

<sup>289</sup> See *id.* at 3–4.

<sup>290</sup> See *id.*

<sup>291</sup> See *Zeran*, 129 F.3d at 333.

<sup>292</sup> See 47 U.S.C. § 230(b); *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

<sup>293</sup> See Mike Blumenthal, *Why Sec 230 of the Communications Decency Act Needs Amending*, BLUMENTHAL’S BLOG (Mar. 30, 2011), <http://blumenthals.com/blog/2011/03/30/why-sec-230-of-the-communications-decency-act-needs-amending/> [<http://perma.cc/UM2V-5MH3>].

<sup>294</sup> See Am. Booksellers Found. Letter, *supra* note 71, at 1.

<sup>295</sup> See Blumenthal, *supra* note 293.

<sup>296</sup> See *id.*

lic regulation.<sup>297</sup> In particular, “the internet allows us to create new opportunities from transactions, or to overcome some of the limitation of the traditional markets.”<sup>298</sup> Accordingly, regulations on interactive computer services such as Airbnb should be embraced in a way that is practical yet proportional to their impact on users and the larger community.<sup>299</sup>

## CONCLUSION

Airbnb’s simultaneous uniqueness and resemblance to traditional legal relationships calls for the application of limited duties and regulations. The company should be held liable for ensuring basic compliance by using reasonable measures similar to what already has been implemented in numerous European cities. Airbnb should continue its initial efforts in ensuring host compliance with local laws, but this should not be limited only to remitting taxes and complying with housing rules. Airbnb boasts that its platform connects people while simultaneously disclaiming any responsibility between it, its users, and the communities that its operations affect. The technology-powered sharing economy presents unprecedented opportunities for producers and consumers to enjoy a more efficient and productive coexistence. The benefits it may offer, however, do not validate the deterioration of systems that have been put in place to ensure safety and to promote a thriving and accessible residential housing market. Web-based platforms have become fixtures in our daily lives, and although they produce benefits, they can also undermine legal frameworks intended to promote safety, competition, and stable communities. In particular, the pervasiveness of Airbnb calls for updates to the laws—both federal and local—that govern behaviors and transactions on the company’s platform.

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<sup>297</sup> See David Hantman, Head of Glob. Pub. Policy, Airbnb, *The Interplay Between Competition, Consumer Protection, and Regulation: Business and Regulatory Views*, *supra* note 269, at 112.

<sup>298</sup> Einav, *supra* note 8, at 11.

<sup>299</sup> See *supra* notes 268–283 and accompanying text.

