

Boston College Law School

## Digital Commons @ Boston College Law School

---

Boston College Law School Faculty Papers

---

5-28-2020

### Boston's Victory Against Airbnb Poses Risks to Internet Economy

Daniel A. Lyons

*Boston College*, [daniel.lyons.2@bc.edu](mailto:daniel.lyons.2@bc.edu)

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lfsp>



Part of the [Internet Law Commons](#), and the [State and Local Government Law Commons](#)

---

#### Recommended Citation

Daniel A. Lyons. "Boston's Victory Against Airbnb Poses Risks to Internet Economy." *Boston Bar Journal* 64, no.2 (2020).

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# Boston Bar Journal

A Peer Reviewed Publication of the Boston Bar Association

## Boston's Victory Against Airbnb Poses Risks to Internet Economy

**Posted:** May 28, 2020 | **Author:** bbabarjournal | **Filed under:** Legal Analysis, Spring 2020 Vol. 64 #2 | **Tags:** Airbnb, boston, housing, Section 230 | [Leave a comment](#)



by Daniel Lyons

### Legal Analysis

Like many popular tourist destinations, Boston benefits from the sharing economy. Innovative intermediaries such as Airbnb have helped middle-class residents supplement their incomes by monetizing their greatest assets: their homes. The new short-term rental market allows homeowners to keep up with rising living costs while providing additional capacity to attract tourists who contribute to the local economy.

Also like many cities nationwide, Boston has struggled with the unintended consequences of this new marketplace. Policymakers are concerned that the new market is incentivizing owners to remove long-term rentals from the housing stock, particularly in popular and space-constrained areas like Chinatown. To mitigate this risk, a **new City of Boston ordinance** (City of Boston Code, Ordinances, § 9-14) requires homeowners to register short-term rental properties with the City and prohibits certain categories of properties from being offered as short-term rentals.

But it is the enforcement mechanism that has drawn the most controversy. In addition to punishing individual homeowners who run afoul of the rules, the ordinance fines intermediaries like Airbnb \$300 per day for each ineligible rental booked on the site.<sup>[1]</sup> Presumably, the fine is designed to entice these

intermediaries to police their sites for violations. But while this attempt to deputize Airbnb reduces the City's enforcement costs, it cuts against one of the fundamental tenets of Internet governance: that platforms generally are not liable for a user's misuse of a neutral tool. This immunity, codified in **Section 230 of the Communications Decency Act**, 47 U.S.C. § 230, makes it possible for companies from eBay to Twitter to connect millions of users without having to monitor their every interaction for potential legal violations. In *Airbnb v. City of Boston*, 386 F. Supp. 3d 113 (D. Mass. 2019), the federal district court upheld the Ordinance against a Section 230 challenge, in a decision that weakens this core statutory protection and may have significant ramifications for the broader Internet economy.

### **Background: Section 230**

Section 230 is the legal cornerstone of the modern Internet economy. Jeff Kosseff, Professor of Cybersecurity at the United States Naval Academy describes it as **The Twenty-Six Words That Created the Internet**. The statute provides that

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.

Congress passed Section 230 in 1996 to address the holding of *Stratton Oakmont v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), which held that online service providers could be held liable as publishers for defamatory statements made by their users. Section 230 itself states that it was designed to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2), by giving platforms discretion to decide when and how to police their sites. It contains exceptions for claims arising under federal criminal statutes (including, in particular, sex trafficking), intellectual property laws (which are governed by a different intermediary liability regime), or state laws that "are consistent with this section." 47 U.S.C. § 230(e).

The following year, the seminal case *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), displayed the expansive scope of the statute in the defamation context. This case involved ads posted on America Online (AOL) selling offensive T-shirts that made light of the 1995 Oklahoma City terrorist bombing. The ads falsely listed plaintiff Ken Zeran as the vendor and included Zeran's home telephone number, prompting irate AOL users to inundate Zeran with angry calls and death threats. Zeran sued AOL, alleging that he notified the company of the defamatory posts but it unreasonably delayed in removing them. The Fourth Circuit found that Section 230 immunized AOL from liability even for messages that the company knew were defamatory. The court justified this broad immunity by noting that with "millions of users," interactive computer services process a "staggering" amount of information. *Id.* "Faced with potential liability for each message republished by their services, interactive computer providers might choose to severely restrict the number and type of messages posted," a threat to free speech that Congress sought to guard against. *Id.*

Subsequent court cases have extended Section 230 far beyond the defamation context, to immunize Craigslist against claims of facilitating **housing discrimination**, eBay from **products liability** claims, and StubHub from violations of state **ticket scalping** laws. It is the resulting broad immunity, protecting intermediaries from liability for most user misconduct, that has shaped much of the current Internet ecosystem. Section 230 entices online news outlets and blogs to permit comment threads without fear of what readers may say. It allows Amazon, TripAdvisor, and Yelp to aggregate and display consumer feedback about products and services. Without Section 230, social media platforms like Facebook and Twitter likely would not exist—or would not be free—because of the high cost of screening every post for potential liability.

Of course, while Section 230 shields the platform from intermediary liability, the user remains liable if the underlying post violates the relevant law. And as the Ninth Circuit explained in *Fair Housing Council of San Fernando Valley v Roommate.com*, 521 F.3d 1157 (9th Cir. 2008), the platform loses its immunity if it is responsible, in whole or in part, for formulating the offending message.

### Section 230 and Boston's Short-Term Rental Ordinance

Given this robust history of Section 230, it seemed an uphill battle for Boston and similar cities seeking to deputize platforms to enforce short-term rental regulations. Like eBay and StubHub listings, the content of an Airbnb listing is written by the individual homeowner. While a local ordinance could penalize individual homeowners for listing ineligible properties, Section 230 prohibits a local ordinance from forcing Airbnb to "verify" that listed properties comply with the law by punishing it for listing an illegal unit. In 2012, a court struck down a comparable attempt by the State of Washington to fine online classified ad publishers unless they verified that models featured in online prostitution ads were adults. See *Backpage.com v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

Boston sought to circumvent Section 230 by punishing not the listing of an illegal unit, but rather providing booking services for an illegal unit. The law provides that "any Booking Agent who accepts a fee for booking a unit as a Short-Term Rental, where such unit is not an eligible Residential unit, shall be fined" \$300 per violation per day. Airbnb sued to enjoin the provision, arguing that the focus on a booking fee rather than the listing was a distinction without a difference, that the effect of the ordinance was to hold intermediaries liable for their users' misrepresentations, and that Section 230 therefore preempts the ordinance.

On preliminary injunction, the court sided with the City.[2] The court found that the penalty provision punished Airbnb for the company's own conduct, namely accepting a fee for booking an ineligible unit.[3] The court explained that the fine is not tied to the content of the underlying listing, and noted that Airbnb remains free to list ineligible units without incurring liability, as long as it does not provide booking services for one.[4] In essence, it requires the company, at the booking stage, to confirm that a listing is eligible under the statute before collecting a fee to complete the transaction.[5] The decision mirrored, and relied upon, two recent decisions upholding similar ordinances in California: *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 680 (9th Cir. 2019), and *Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F. Supp. 3d 1066, 1071 (N.D. Cal. 2016). In the process, the court rejected Airbnb's argument that the First Circuit has interpreted Section 230 more broadly than the Ninth Circuit.[6]

Although Airbnb appealed the decision to the First Circuit, it ultimately settled before argument to reduce its financial exposure. Under the settlement agreement, the company agreed to require any user posting a Boston listing to provide a City-issued Registration Number. The company also agreed to send Boston a monthly report of active listings within the City. The City will then notify Airbnb of listings that it believes are ineligible, which Airbnb will deactivate within 30 days. The agreement provides that compliance with this procedure will constitute a safe harbor shielding against booking agent liability under the ordinance.

### Unintended Consequences of Court Decision

One can sympathize with Boston's desire to rein in the excesses of the short-term rental market. Tourist demand for alternatives to traditional lodging remains high, increasing the risk that short-term rentals will siphon off housing stocks in an already capacity-constrained residential market. This is especially problematic if the properties in question receive benefits (such as low-income assistance) designed to

encourage residential stability, if the property poses a risk to tourists, or if increased tourist activity harms the local community.

In that sense, it is both expected and appropriate that the City would regulate Boston homeowners who seek to participate in the short-term rental market, just as it does innkeepers and landlords. Boston has authority to decide which properties can be made available and on what terms. And it is free to enforce those regulations directly against individual violators, by dedicating resources to reviewing listings, identifying properties that are out of compliance with the ordinance, and bringing appropriate enforcement action against the lawbreakers.

But the court's approval of the City's plan to commandeer platforms to aid enforcement reflects a potentially problematic shift in Section 230 jurisprudence. As an initial matter, the court's distinction between listing and booking seems strained. The court posited that Airbnb remains free to list illegal units, as long as it doesn't actually book them. But as Professor Eric Goldman of Santa Clara University **notes in connection with the similar San Francisco ordinance**, listing properties that the company cannot or will not book could set up Airbnb for a false advertising suit; if it wishes to adhere to its preexisting business model and avoid bait-and-switch liability, the company effectively must verify that listings are eligible before posting.

Even if, as the court suggested, Airbnb need only verify eligibility at the point of booking, the verification obligation imposes significant costs upon these intermediaries. The court minimized this obligation, stating the ordinance "simply requires Airbnb to cross-reference bookings against the City's list of ineligible units before collecting its fees."<sup>[7]</sup> But this simplifies the burden that Airbnb faces. Boston's ordinance punishes the accepting of a fee for booking an ineligible unit, a category that includes:

- Units subject to affordability covenants or housing assistance under local, state, or federal law;
- Units prohibited from leasing or subleasing under local, state, or federal law; and
- Units subject to three or more violations of any municipal ordinance or state law relating to excessive noise, improper trash disposal, or disorderly conduct within a six-month period.<sup>[8]</sup>

While the ordinance requires the City to create an ineligible units list, it does not provide a safe harbor for booking agents that cross-reference bookings against that list. On its face, then, booking agents must independently determine whether each Boston booking violates any of the myriad eligibility requirements.

The settlement reduced Airbnb's compliance costs, but the ordinance remains as written for other booking agents. Of course, the cost of even the settlement's modified monitor-and-takedown procedure is not trivial—particularly if, **as Professor Goldman notes**, other cities follow Boston's example. Airbnb and other intermediaries must keep abreast of nuanced ordinances in myriad cities and states nationwide and tailor their algorithms to verify eligibility. While this increased cost may not make the booking model uneconomic, it could lead some booking companies to withdraw from more heavily regulated markets.

The proliferation of ordinances like Boston's could also entrench existing companies by raising the costs of entry for new entrepreneurs in this space. Indeed, this could be one reason why Airbnb settled the Boston case and **similar litigation in Miami Beach, Florida**: as the market leader, Airbnb can perhaps bear these compliance costs easier than its competitors. The settlement agreement itself suggests that Airbnb is using regulation to secure its position: a provision titled "Fairness Across Platforms" requires the City to negotiate with Airbnb's competitors, three of which are listed by name, mandates that the

City provide Airbnb a copy of any agreement it enters with another platform, and provides for Airbnb to modify its agreement if another platform receives a more favorable provision. It also requires the City to confer with Airbnb to discuss compliance efforts taken against platforms that have not entered such agreements.

### Ramifications for the Broader Internet Economy

The Boston Airbnb decision shows that the erosion of Section 230 immunity is now spreading beyond the Ninth Circuit. Other cities that share Boston's concerns about the growth of the short-term rental market now have a model to enlist platform providers as enforcers. For Airbnb and similar platforms, this likely means staffing additional compliance resources to learn and respond to a growing number of local regulations.

Entrepreneurs and those advising platform-based startups should also recognize that this erosion is not necessarily limited to the short-term housing market. The court's approval of a verification obligation could potentially open the door to significant state and local regulation of the Internet economy. For example, **Professor Goldman notes that** licensing boards could require that online marketplaces verify that sellers have appropriate business licenses before completing a transaction. Cities may require ride share operators to assure that drivers meet local qualifications. States could require eBay and other clearinghouses to confirm that goods comply with local commerce and product liability laws. And payment processors further up the supply chain could find themselves saddled with similar verification requirements.

The court's decision also shapes how future tech entrepreneurs should structure their businesses. By bifurcating Airbnb's listing and booking functions, the decision favors certain business models over others. Airbnb faces liability for facilitating rental of an ineligible property, while online classified ad companies like Craigslist retain Section 230 immunity for the same action, based solely on how each company chooses to fund its activities. Going forward, this decision incentivizes companies to move away from collecting fees for facilitating transactions, and instead to embrace advertising-based revenue models, or models that charge a fee per listing—both of which would remain protected under Section 230.

It is too early to state with precision what effect this decision will have on the development of the sharing economy. But the court's decision, coupled with the San Francisco and Santa Monica cases, suggest that local regulators may have a powerful new tool to address their public policy concerns. Internet-based platform providers must adapt if they wish to continue relying upon Section 230 to shield innovative new efforts to connect buyers and sellers online.

[1] As the court clarified, "ineligible" properties are those that categorically cannot be offered as short-term rentals. The statute does not punish booking agents for booking eligible but unregistered properties.

[2] *Airbnb*, 386 F.Supp.3d at 120.

[3] *Id.*

[4] *Id.* at 120-121.

[5] The Court contrasted this Penalty Provision with another part of the statute, the "Enforcement Provision," which prohibits Airbnb from operating within Boston unless it enters an agreement with the city to "actively prevent, remove, or de-list any eligible listings." *See id.* at 123-124. At oral argument, the

city conceded that the threat of banishment for failure to monitor and remove listings effectively imposed liability on Airbnb for publication of third-party conduct, and on the basis of that concession, the court enjoined the Enforcement Provision. *Id.* at 123. The court also enjoined parts of a data reporting provision on unrelated grounds. *Id.* at 124-125.

[6] *Id.* at 120 n.5.

[7] *Airbnb*, 386 F.Supp.3d at 121.

[8] *See An Ordinance Allowing Short-Term Residential Rentals in the City of Boston, Section 9-14.4A.*

*Daniel Lyons is a Professor at Boston College Law School, where he researches and writes in the areas of telecommunications, energy, and administrative law. Professor Lyons is also a Visiting Fellow at the American Enterprise Institute, where he regularly blogs about tech policy issues.*

---

---

**Blog at WordPress.com.** Mid Mo Design.