

2017

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Recommended Citation

31 Prob. & Prop. 36 (2017)

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Airbnb and the Battle Between Internet Exceptionalism and Local Control of Land Use

By Stephen R. Miller and Jamila Jefferson-Jones

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This article examines the tension between local regulatory control of land use and “Internet exceptionalism,” the notion that it is “justify[able] to treat[] regulation of information dissemination through the Internet differently from regulation of such dissemination through nineteenth- and twentieth-century media, such as print, radio, and television.” Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 Wm. & Mary L. Rev. 1637, 1638 (2015). In particular, the authors of this article focus on suits brought by Airbnb against San Francisco and New York, cities seeking to regulate land use in a manner Airbnb argued was counter to prevailing norms of Internet exceptionalism, as codified in the Communications Decency Act (CDA). The tensions highlighted by these suits speak to the need for land use lawyers to understand the regulatory environment of the Internet. This is especially necessary as “sharing economy” companies, such as Airbnb, become more prevalent and attempt to exert their influence on the ways in which state and local governments regulate land use.

In 2016, Airbnb sued at least four cities—San Francisco, New York City, Santa Monica, and Anaheim—alleging local land use controls were preempted by the Communications Decency Act, 47 U.S.C. § 230 (“CDA § 230”). CDA § 230 is veritable hallowed ground for Internet lawyers; as an amicus brief in one of the cases argued, “Section 230 immunity is an essential part of the architecture of the Internet that serves the public interest by promoting speech by a diverse array of voices.” Amicus Curiae Brief of Elec. Frontier Found., Ctr. for Democracy & Tech., Daphne Keller, Eric Goldman and Eugene Volokh in Support of Plaintiffs’ Motion for Preliminary Injunction at 6, *Airbnb, Inc. v. City & Cty. of San Francisco*, No. 3:16-CV-03615-JD (N.D. Cal., filed Sept. 9, 2016).

But, in November, a federal district judge denied Airbnb’s request for a preliminary injunction, finding that CDA § 230 did not preempt San Francisco’s regulation of short-term rentals. The decision has caused significant hand-wringing over the future of CDA § 230 and protections for Internet platforms. On the other hand, the case has exposed a growing rift between the type of Internet exceptionalism preferred by many Internet proponents and the desire to retain local control of land use decisions that govern how our cities and neighborhoods function.

The San Francisco case arose out of the city's effort to regulate aspects of the "sharing economy" for accommodation rentals. *Airbnb, Inc. v. City & Cty. of San Francisco*, No. 3:16-CV-03615-JD, 2016 WL 6599821 *1 (N.D. Cal. Nov. 8, 2016). Beginning in 2015, San Francisco enacted a series of ordinances that lifted a previous ban on short-term rentals in the city. Under the new regulations, permanent residents could engage in short-term rentals if they registered the residence with the city and met several other requirements, including proof of liability insurance, compliance with municipal codes, usage reporting, and tax payments. Compliance with these regulations was low; as of November 2015, the city had received only 1,082 short-term rental registration applications while Airbnb listed 5,378 unique short-term rental hosts in San Francisco. By March 2016, the ratio was 1,647 registered out of 7,046 listed. The city also found enforcing the regulations difficult because Airbnb and other hosting platforms do not disclose addresses or booking information about hosts.

In response, San Francisco enacted another series of ordinances to assist enforcement. At issue in this case was the last of these ordinances, which made it a misdemeanor to collect a fee for providing booking services for the rental of an unregistered unit. *Id.* at *2. The ordinance defines a "Booking Service" as "any reservation and/or payment service provided by a person or entity that facilitates a short-term rental transaction between an Owner . . . and a prospective tourist or transient user . . . for which the person or entity collects or receives . . . a fee in connection with the reservation and/or payment services." *Id.* The ordinance defines a "Hosting Platform" as a "person or entity that participates in the short-term rental business by providing, and collecting or receiving a fee for, Booking Services." *Id.*

The ordinance expressly states that a Hosting Platform includes more than just "an online platform" and encompasses non-Internet-based services, too. The ordinance permits a Hosting Platform to "provide, and collect a fee for, Booking Services in connection with short-term rentals for Residential Units located in the City and County of San Francisco only when those Residential Units are lawfully registered on the Short Term Residential Rental Registry" at the time of rental. *Id.* The city's enforcement office interpreted "lawfully registered" to mean that a host has obtained a registration number from the office. *Id.* A violation constitutes a misdemeanor punishable by a fine of up to \$1,000 and imprisonment for up to six months. Airbnb challenged this ordinance and sought an injunction against its enforcement.

Although Airbnb made several arguments, its primary argument was that CDA § 230 preempted the ordinance. CDA § 230(c)(1) states that "[n]o 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." The CDA includes an express preemption clause, which provides "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

Airbnb argued that the threat of a criminal penalty for providing and receiving a fee for Booking Services for an unregistered unit requires that it actively monitor and police listings by third parties to verify registration, which would be tantamount to treating them as a publisher because it involves the traditional publication functions of "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Airbnb*, 2016 WL 6599821, at *3.

The court disagreed. By the court's reasoning, the text and plain meaning of the ordinance demonstrates that it does not regulate what can or cannot be said or posted in the listings; rather, under the San Francisco ordinance, Airbnb is perfectly free to publish any listing they get from a host and to collect fees for doing so—whether the unit is lawfully registered or not—without threat of prosecution or penalty under the ordinance. The ordinance holds Airbnb liable only for providing, and collecting a fee for, Booking Services in connection with an unregistered unit. In analyzing existing case law, the court held that because the regulation only regulated the collection of the fee, CDA § 230 did not apply. Determining that Airbnb had not demonstrated a likelihood of success or a serious question of preemption under CDA § 230, the court denied the injunction. See *id.* at *3–6.

Surprisingly, after losing the injunction, Airbnb did not appeal but instead settled with San Francisco. As of this writing, Airbnb and the city are still working on terms of settlement and how enforcement and registration will be implemented.

Similarly, Airbnb surprisingly settled its CDA § 230 case with New York City. On October 21, 2016, New York Governor Andrew Cuomo signed into law an amendment to the state's Multiple Dwelling Law (MDL) that prohibits the advertising "occupancy or use" of units in "class A" multiple dwellings for purposes other than permanent residence use. N.Y. Mult. Dwell. Law art. 4, § 121.1. "Permanent residence purposes" are defined as the "occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more." *Id.* art. 1, § 4.8(a). Such short-term rentals were already prohibited under the MDL. *Id.*

On the same day MDL § 121 became law, Airbnb filed suit seeking to enjoin the new provision, claiming that, among other things, it violated CDA § 230. Complaint, *Airbnb, Inc. v. Schneiderman*, No. 1:16-cv-08239 (S.D.N.Y. Oct. 21, 2016). In particular, Airbnb contended that the new law, which provided for up to \$7,500 in fines for violators, could apply to hosts as well as to platform owners. *Id.* at 10. Airbnb objected to the application to platform owners as a violation of CDA § 230. *Id.* at 1.

New York Attorney General Eric Schneiderman's office had already determined, three years before the enactment of MDL § 121, that Airbnb hosts had been violating the MDL. In October 2013, Schneiderman's office issued a series of subpoenas requesting data on Airbnb's hosts for the previous three years. See *Airbnb v. Schneiderman*, 989 N.Y.S.2d 786, 788–89 (Sup. Ct. 2014). As a result of the subpoenas, Airbnb and the Attorney General entered into an agreement whereby Airbnb would provide the Attorney General with anonymized data on its New York City hosts. If after reviewing such data, the Attorney General or the New York City Office of Special Enforcement instituted an investigation of or undertook an enforcement action against a specific host, Airbnb agreed that it would provide non-anonymized information on that host. By August 2014, Airbnb had complied with this agreement, supplying the Attorney General with anonymized information on approximately 16,000 hosts and giving the Attorney General specific, non-anonymized information on 124 hosts. The momentum behind the enactment of MDL § 121 was a direct result of the information attained by the agreement between the Attorney General and Airbnb.

The Airbnb suit seeking to enjoin the enforcement of MDL § 121 was short-lived. Airbnb settled with the New York Attorney General in November 2016 and with New York City in December 2016. Under the terms of the settlement agreements, neither of the parties admitted to any unlawful actions. See *Stipulation of Settlement and Dismissal as Against Defendant Eric Schneiderman, Airbnb, Inc. v. Schneiderman*; *New York Stipulation of Settlement and Dismissal, Airbnb, Inc. v. Schneiderman*. Per the settlement agreements, both the Attorney General and the city agreed not to enforce MDL § 121. *Id.* Moreover, under its agreement with the city, Airbnb agreed “to continue work cooperatively on ways to address [the city’s] permanent housing shortage, including through host compliance with Airbnb’s ‘One Host, One Home’ policy.” *New York Stipulation of Settlement and Dismissal, Airbnb Inc. v. Schneiderman*. Under the “One Host, One Home” policy, which also has been instituted by Airbnb in San Francisco, Airbnb permits hosts to post listings at only one address. “One Host, One Home” was instituted in New York in 2015 and in San Francisco in 2016.

Although Airbnb took a conciliatory approach in San Francisco and New York City after its loss to San Francisco in federal district court, the company continues its litigious approach with other local governments. In Anaheim, Airbnb’s CDA § 230 litigation convinced the city to change course and not impose penalties on the company, while the Santa Monica case remains stayed pending proposed amendments to the challenged ordinance. See Lily Leung, *Anaheim Won’t Fine Websites Like Airbnb for Illegal Short-Term Rental Listings*, Orange Cty. Register (Aug. 22, 2016), tinyurl.com/zyoumpv; *Airbnb, Inc. v. City of Santa Monica*, No. 2:16-cv-06645 (C.D. Cal., filed Sept. 2, 2016).

No matter how these first cases are resolved, they are likely to be just one of many salvos to be fought between those who seek to privilege Internet businesses and those who jealously guard local land use controls. See generally Fed. Trade Comm’n, *The “Sharing” Economy: Issues Facing Platforms, Participants & Regulators* (Nov. 2016), tinyurl.com/z7k7aaf (cataloguing numerous sharing economy issues).

Thus far, Internet proponents have been far more organized in making their case. For instance, in the San Francisco case, several amicus briefs were filed by leading voices of Internet exceptionalism. For instance, the Electronic Frontier Foundation, Center for Democracy and Technology, Daphne Keller, Eric Goldman, and Eugene Volokh argued:

It would be similarly impossible for intermediaries to comply with the enormous variety of international, state and local laws. This point is especially evident here where the law at issue is a local ordinance, and that hundreds of other laws with differing provisions may be adopted across the country.

Amicus Curiae Brief, *supra*, at 5. Of course, Internet companies have made similar complaints in the past, but have subsequently been able to address state and local regulations quite easily. Take, for instance, the collection of state sales taxes by on-line retailers or even Airbnb’s own collection and remittance of transient occupancy taxes for local governments across the globe. As the digital age evolves, the infeasibility of platforms meeting state and local government regulatory demands as a reason not to be regulated rings increasingly hollow. Indeed, one might expect that the next major platform could be the one that easily facilitates the coordination of regulation between Internet firms and local

governments. Although there are some 50 states and some 39,000 local governments in the United States, it remains a stable collection of entities that could seemingly be coordinated through a platform that wedded regulations to the regulated platform businesses, such as Airbnb.

In addition, the Internet Association and CalInnovates filed an amicus brief stating:

That is not to say that there is no role for government oversight of platform-based marketplaces. It is merely a recognition that the traditional modalities of command-and-control regulation break down when governments try to apply them against Internet intermediaries. After all, a blog site is not a newspaper. An auction site is not a department store. One cannot hope to address the challenges of the future with only the tools of the past. Platform-based marketplaces are fundamentally different from earlier business models, and the CDA ensures that they are free from interference arising from their use by others to transmit and exchange information, including transactions that depend upon the platform to do so.

Brief of Amici Curiae the Internet Ass'n & CalInnovates in Support of Plaintiffs' Motion for Preliminary Injunction at 15, *Airbnb, Inc. v. City & Cty. of San Francisco*, No. 3:16-CV-03615-JD (N.D. Cal., filed Sept. 8, 2016). Here, the Internet exceptionalists argue that the nature of how commerce is conducted—on the Internet—should exempt it from regulation simply because of the uniqueness of how such business is conducted. The problem with that argument is its *reductio ad absurdum* quality: according to this argument, any existing brick-and-mortar business facing regulations can re-constitute itself as an Internet platform-based business and thus evade regulation altogether. For instance, a taxi company facing local regulations begins offering those services online and—poof!—it exists beyond the scope of regulation. Or, as with Airbnb, the hosting of transient occupants is highly regulated in the form of hotels but—poof!—placed on-line and conducted in a decentralized fashion, suddenly becomes beyond the scope of regulation.

Conclusion

As the sharing economy evolves, it will be important to remain practical in regulating these new forms of commerce that, while still a small part of the economy today, remain quite disruptive to certain industries and have the potential to disrupt many more. Such practicality, however, should also challenge the status quo of Internet exceptionalism that seeks to hide the real effects of platform-based businesses on local communities. Rather, our communities would be better off to acknowledge the local effects of Internet-based businesses and seek new approaches to regulatory models that ease local involvement in regulating global businesses.

The authors of this article suggest that those legal scholars and practitioners who have traditionally focused on matters of local concern—such as land use and local fiscal policy—must become versed in, and speak up on, matters of the Internet. Similarly, scholars and practitioners who have focused primarily on Internet matters must become familiar with why local regulatory structures exist and the underlying values those regulations reflect. To facilitate this discussion, the authors of this article are chairing the ABA's newly-formed Sharing Economy Committee, which is sponsored by the Section of State and Local Government Law. The authors seek a broad array of participation to facilitate an

enriched dialogue about ways forward on these crucial issues. Interested persons should feel free to contact the authors to learn more about participating in the newly formed committee. The article authors also are in progress of writing the *ABA State & Local Government Sharing Economy Manual*, which should be in print in late 2017. Although easy answers remain elusive on many sharing economy issues now, opening a dialogue between Internet and local government law communities becomes an important way forward in making the most of these new technologies. n