

# AIRBNB: A NOT-SO-SAFE RESTING PLACE

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INTRODUCTION

Imagine you are preparing to go on vacation to Aruba. You decide to make some money to help pay for all of those piña coladas, so you list your apartment on an online rental website. At first it sounds like a great idea: the company running the website handles all of the financial details and you have the option to reject any potential renters before they stay in your home. You find a responsible renter and leave for your weeklong vacation, knowing the money from renting your apartment is helping pay for your trip. Afterward, you arrive to find your home in pristine condition. Your guest-renter even took out the trash before leaving. Everything seems fine—until your landlord tells you that you are not only being evicted, but that the city is going to fine you tens of thousands

of dollars for illegally renting out your home.<sup>1</sup> Suddenly, your brilliant idea has become a nightmare.

The rise of the Internet has led to a growth in peer-to-peer business models.<sup>2</sup> This business model is based on the premise that by interacting directly, individuals can provide each other's needs in a business transaction (supplies and consumers), thus cutting out the middleman.<sup>3</sup>

Airbnb is one such company that has taken advantage of the growing trend towards peer-to-peer transactions.<sup>4</sup> Airbnb currently has more than 20 million "guests" using its services and rental locations in 190 countries.<sup>5</sup> In the United States, Airbnb relies on § 230 of the Federal Communications and Decency Act ("§ 230") to protect itself from civil liability. Unfortunately, § 230 has not stopped hotel associations and lawmakers from targeting Airbnb's users. This creates uncertainty for users who are not sure if renting out their homes is lawful. Worse still, some users have already faced lawsuits and penalties, including large fines like those considered in the above hypothetical.

Part I of this note lays out Airbnb's business model, and describes the development of the community marketplace. Part II studies the mixed reputation that Airbnb has garnered within society. Part III concentrates on the various responses and reactions Airbnb has generated among critics and proponents of the status quo, including state and local efforts to regulate the peer-to-peer rental industry, efforts to change federal law, and consequences of leaving Airbnb unregulated. Part IV offers a middle-ground approach to regulation. Finally, Part V concludes that based on the totality of circumstances, Airbnb cannot remain unregulated because of the risk posed to consumers.

## I. AIRBNB AND THE COMMUNITY MARKETPLACE

Airbnb's business model relies on what has become known as the

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1. This hypothetical is inspired by the real-life story of Nigel Warren, as reported in Ron Lieber's New York Times Article. Ron Lieber, *A Warning for Hosts of Airbnb Travelers*, N.Y. TIMES (Nov. 30, 2012), [http://www.nytimes.com/2012/12/01/your-money/a-warning-for-airbnb-hosts-who-may-be-breaking-the-law.html?pagewanted=all&\\_r=3&](http://www.nytimes.com/2012/12/01/your-money/a-warning-for-airbnb-hosts-who-may-be-breaking-the-law.html?pagewanted=all&_r=3&).

2. See *The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), available at <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

3. See David Prosser, *Peer-to-Peer Lending: Here Come the Brits*, FORBES (Oct. 24, 2013, 7:00 AM), <http://www.forbes.com/sites/davidprosser/2013/10/24/peer-to-peer-lending-here-come-the-brits/> (explaining the peer-to-peer business model using online lender Funding Circle as an example); see also Bronwyn Fryer, *Power to the People*, HARV. BUS. REV. (Jan. 2001), available at <http://hbr.org/2001/01/power-to-the-people/ar/1> (using eBay as an example of a true peer-to-peer business model).

4. RACHEL BOTSMAN & ROO ROGERS, WHAT'S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION xiii (2010) ("Airbnb is an old idea, being replicated and made relevant again through peer-to-peer networks and new technologies").

5. *About Us*, AIRBNB, <https://www.airbnb.ca/about/about-us> (last visited Nov. 9, 2014).

“sharing economy.”<sup>6</sup> The sharing economy is premised on access to, rather than ownership of, resources.<sup>7</sup> Particularly, the sharing economy is based on certain principles that work from the hyperlocal level: a communications platform, ability to build up trust, resource sharing, transportation, focus on the local food system, and a knowledge-system.<sup>8</sup> The sharing economy has spread to various business areas, including the legal profession.<sup>9</sup>

Enmeshed within the sharing economy, the community marketplace arose. As those seeking to build community marketplaces have written, an integral part of a successful online marketplace is the proper balance of supply and demand.<sup>10</sup> Community marketplaces like Airbnb rely on the Internet to provide a forum for users to interact and engage in the exchange of services. Airbnb set itself up as a community marketplace by attempting to connect people who have extra rooms or homes to those who are looking to travel and stay in an untraditional setting.<sup>11</sup> Airbnb’s unique business model—serving as a lodging intermediary—has attracted customers and proven successful. However, it also creates with legal uncertainty, since Airbnb does not fit neatly into the heavily regulated hotel and guest accommodation industry.

#### A. Airbnb’s Business Model and the Short-Term Rental Industry

Airbnb is a self-defined “community marketplace,” directly connecting hosts and consumers in a short-term rental economy outside of the traditional rental industries (such as hotels or bed-and-breakfasts).<sup>12</sup> As a community marketplace, Airbnb considers itself an online “platform,” functioning as an intermediary.<sup>13</sup> By aggregating customer reviews, connecting consumers’ social networks to their

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6. A “sharing economy” or a “peer economy” marketplace embodies the idea of “an entirely new asset-light supply paradigm. They enable the disaggregation of physical assets in space and in time, creating digital platforms that make these disaggregated components—a few days in an apartment . . . amenable to pricing, matching, and exchange.” Arun Sundararajan, *From Zipcar to the Sharing Economy*, HARV. BUS. REV. BLOG (Jan. 3, 2013, 11:43 AM), <http://blogs.hbr.org/2013/01/from-zipcar-to-the-sharing-eco/>.

7. Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 4-5 (2012).

8. See Randy White, *The Sharing Economy: ‘Plan B’ for Moving America Forward*, TEDxSoMa (June 28, 2011), <http://tedxtalks.ted.com/video/TEDxSoMa-Randy-White-The-Sharin>.

9. *The Book*, SUSTAINABLE ECONOMIES LAW CENTER, <http://www.thesecl.org/book> (last visited Nov. 9, 2014).

10. Eric Savitz, *5 Tips for Building a Two-Sided Online Marketplace*, FORBES (Feb. 7, 2013, 11:55 PM), <http://www.forbes.com/sites/ciocentral/2013/02/07/5-tips-for-building-a-two-sided-online-marketplace/>.

11. AIRBNB, *Supra* note 5.

12. AIRBNB, *supra* note 5.

13. *Terms of Service*, AIRBNB (June 30, 2014), <https://www.airbnb.com/terms>.

Airbnb accounts, and acting as a secure payment intermediary, Airbnb builds trust between hosts and guests, facilitating the rental transaction.<sup>14</sup> Rachel Botsman<sup>15</sup> and Roo Rogers,<sup>16</sup> who have written about the rise of the sharing economy, suggest that building trust between strangers was the main reason the market for peer-to-peer rentals remained untapped prior to Airbnb.<sup>17</sup> Once Airbnb arrived, it allowed homeowners and renters to build trusting relationships and create a new industry for peer-to-peer rentals.

Despite or because of its number of global<sup>18</sup> Airbnb disclaims any liability for use of its services. Instead, Airbnb encourages users to be aware of their particular locality's rules, zoning restrictions, and tax regulations, before placing a home or apartment up for rent on Airbnb's site.<sup>19</sup> This is laid out under the "User Conduct" and "Taxes" sections of the Terms of Service.<sup>20</sup> Airbnb also provides some guidance on "legal and regulatory issues" that potential hosts should watch out for.<sup>21</sup> However, this guidance is mainly limited to reminding users to check the laws of their locality.

In response to recent criticism,<sup>22</sup> Airbnb has placed a pop-up on its website that warns hosts to comply with local laws.<sup>23</sup> This warning is as limited as the guidance provided elsewhere on the site, albeit in a more prominent place.<sup>24</sup> Although Airbnb does say these restrictions are often

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14. *Trust*, AIRBNB, <https://www.airbnb.com/trust> (last visited Nov. 9, 2014).

15. *About*, RACHEL BOTSMAN, <http://www.rachelbotsman.com/about/> (last visited Nov. 9 2014) ("Rachel Botsman is a global thought leader on the power of collaboration and sharing through digital technologies to transform the way we live, work, and consume" and a co-author of *What's Mine is Yours: How Collaborative Consumption is Changing the Way We Live*).

16. Lora Kolodny, *Roo Rogers on What's Next in the Sharing Economy*, FAST COMPANY (Aug. 26, 2011, 12:25 AM), <http://www.fastcompany.com/1776320/roo-rogers-whats-next-sharing-economy> (noting Roo Rogers is a co-author of *What's Mine is Yours: How Collaborative Consumption is Changing the Way We Live* and the president of Red Scout Ventures).

17. BOTSMAN & ROGERS, *supra* note 4, at x.

18. Airbnb has locations in over 34,000 cities and in 190 countries. AIRBNB, *supra* note 5.

19. *See* AIRBNB, *supra* note 13 (stating that users are responsible for complying with all local laws, rules, and regulations).

20. *Id.*

21. *What Legal and Regulatory Issues Should I Consider Before Hosting on Airbnb?*, AIRBNB, <https://www.airbnb.com/help/question/376> (last visited Nov. 9, 2014).

22. *See* Ron Lieber, *A \$2,400 Fine for an Airbnb Host*, N.Y. TIMES BUCKS BLOG (May 21, 2013, 2:22 PM), <http://bucks.blogs.nytimes.com/2013/05/21/a-2400-fine-for-an-airbnb-host/>.

23. David A Smith, *Outbreak of Informality: Part 2, Don't Think of It as Protection Money*, AFFORDABLE HOUSING INSTITUTE (Sept. 19, 2013), <http://affordablehousinginstitute.org/blogs/us/2013/09/outbreak-of-informality-part-2-dont-think-of-it-as-protection-money.html>.

24. *See id.*

part of a city's zoning laws or administrative codes,<sup>25</sup> such is not sufficient guidance. The overly broad and vague warning risks consumer misinformation and uncertainty.

Airbnb is not the only company caught in the confusing realm of local governance of short-term rentals. Other short-term peer-to-peer rental businesses, including Homeaway<sup>26</sup> and Flipkey, face the same uncertainty.<sup>27</sup> To combat the uncertainty, Airbnb, TripAdvisor, Homeaway, and Flipkey started an informative advocacy group known as the Short Term Rental Advocacy Center (the "Center").<sup>28</sup> The Center suggests research tools for people considering short-term hosting<sup>29</sup> and resources for finding local groups who lobby local governments to allow peer-to-peer renting.<sup>30</sup> But these resources fail to address situations like that of our hypothetical Aruba vacationer: how do you ensure with certainty that you are not breaking any laws? The Center serves as a lobbying body, and not as a tool for users to understand how to avoid violating local laws.

### B. *The Rise of the Sharing Economy*

Airbnb and other short-term rental organizations are part of the sharing economy. As mentioned earlier, the sharing economy is defined by the unique way in which it has developed, "built from the ground up by every individual and group that chooses to begin consuming, transacting, or making a livelihood in a new way."<sup>31</sup> Airbnb is not the only example of a business that has built itself upon this principle.<sup>32</sup> Other businesses, including Uber, Lyft, ParkatmyHouse, and SnapGoods,<sup>33</sup> use peer-to-peer rental platforms.<sup>34</sup> Airbnb is defined by its

25. AIRBNB, *supra* note 13.

26. See HOMEAWAY, <http://www.homeaway.com> (last visited Nov. 13, 2014).

27. See FLIPKEY, <http://www.flipkey.com> (last visited Nov. 13, 2014).

28. *About Us*, SHORT TERM RENTAL ADVOC. CTR., <http://www.stradvocacy.org/about-us/#.U1AurBYhd8M> (last visited Nov. 13, 2014).

29. *Act*, SHORT TERM RENTAL ADVOC. CTR., <http://www.stradvocacy.org/act/#.UlnEbmQ6X8o> (last visited Nov. 13, 2014).

30. SHORT TERM RENTAL ADVOC. CTR., <http://www.stradvocacy.org/> (last visited Nov. 13, 2014).

31. Kassan & Orsi, *supra* note 7, at 4.

32. See James Surowiecki, *Uber Alles*, NEW YORKER (Sept. 16, 2013), [http://www.newyorker.com/talk/financial/2013/09/16/130916ta\\_talk\\_surowiecki](http://www.newyorker.com/talk/financial/2013/09/16/130916ta_talk_surowiecki).

33. *Id.*

34. Companies such as Airbnb might more properly be referred to as "Peers Incorporated" than "peer-to-peer." See generally Jessica Gross, *11 Fascinating 'Peers Incorporated' Businesses*, TED BLOG (Dec. 17, 2012, 10:38 AM), <http://blog.ted.com/2012/12/17/11-fascinating-peer-incorporated-businesses> (last visited Oct. 12, 2013) (discussing Robin Chase's preference for referring to some companies as "Peers Incorporated" rather than "peer-to-peer" to distinguish when "companies marry a corporate side—which uses economies of scale, resources, expertise and standards to create a platform—with a peer side, whose diversity, specialization, and innovation yield services and products").

users. Because its users also choose to participate and supply the goods and services essential to Airbnb's rental business, Airbnb is part of the sharing economy.

The growing number of businesses in the sharing economy is related to many factors, two of which will be discussed here: the changing economic structure of consumer transactions and the rise of the Internet. These factors are heavily intertwined but offer unique viewpoints in isolation. Certain analysts have framed the sharing economy as a complete economic shift because "[t]he world's economic and ecological meltdowns demand that we now redesign our livelihoods, our enterprises, our communities, our organizations, our food systems, our housing, and much more."<sup>35</sup> Others view the sharing economy as being best suited for certain goods and services, predominantly "items that are expensive to buy and are widely owned by people who do not make full use of them."<sup>36</sup> Alternatively, some have pointed out that the sharing economy is not actually a new economy, but a mere supplement to the existing economy.<sup>37</sup> When defining the sharing economy, individuals have pointed to its rise during a time of "recession and the growing divide between the rich and poor."<sup>38</sup> Regardless of whether the shift constitutes a total economic restructuring or a mere addition to the current economic structure, the sharing economy is changing the way people do business.

Part of this change is linked to the rise of the Internet, which has contributed to the ease with which consumers and sellers can access markets.<sup>39</sup> As of 2013, 2.7 billion people use the Internet across the world.<sup>40</sup> In the United States, eighty percent of people use the Internet.<sup>41</sup>

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35. Kassan & Orsi, *supra* note 7, at 2.

36. *The Rise of the Sharing Economy*, *supra* note 2.

37. Dominic Basulto, *The Sharing Economy: How Do You Stop Something You Can't Keep up With?*, WASH. POST (May 24, 2013), <http://www.washingtonpost.com/blogs/innovations/wp/2013/05/24/the-sharing-economy-how-do-you-stop-something-you-cant-keep-up-with/> ("What's actually happening is that these sharing economy companies are going places where Adam Smith's 'invisible hand' cannot. They are re-calibrating supply and demand, giving consumers access to otherwise unused capacity or idle assets. Instead of representing an entirely new underground economy, the companies of the sharing economy represent more of a supplement, adding capacity while driving down prices in ways that help consumers.").

38. Mike Jones, *How Capitalism and Regulation Will Reshape the Sharing Economy*, FORBES (Oct. 9, 2013, 10:00 AM), <http://www.forbes.com/sites/ciocentral/2013/10/09/how-capitalism-and-regulation-will-reshape-the-sharing-economy/>.

39. *Id.* (naming access to the Internet as one of the defining differentiators of the sharing economy).

40. *The World in 2013: ICT Facts and Figures*, INT'L TELECOMMS. UNION, 1, 2, (2013), <http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2013-e.pdf>.

41. Caitlin Dewey, *The 60 Million Americans Who Don't Use the Internet, in Six Charts*, WASH. POST (Aug. 19, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/19/the-60-million-americans-who-dont-use-the-internet-in-six-charts/>.

The National Telecommunications and Information Administration (“NTIA”), an organizational component of the executive branch, is responsible for advising the President of the United States on telecommunication and information policy issues.<sup>42</sup> In its recent report, it hypothesized “that the Internet has become integral to American life.”<sup>43</sup> This hypothesis is based on the societal benefits that the Internet offers, such as education, job search capabilities, and ability to inform healthcare decision-making.<sup>44</sup> Moreover, fifty-two percent of Internet users over the age of twenty-five rely on the Internet for “consumer services.”<sup>45</sup> The growing amount of Internet use by individuals has contributed vastly to the rise of the sharing economy. As individuals restructure their lives around the sharing economy, Congress and local governments should pay increased attention to the laws on which the sharing economy relies. This heightened attention will facilitate the development of a flexible and responsive system for governing the developing industries and their users within the sharing economy.

## II. AIRBNB: A MIXED REPUTATION

In determining whether Congress or local governments should act to rein in Airbnb, society’s response to Airbnb serves as a guidepost for areas where regulation may be needed. Airbnb has developed a mixed reputation within the United States. This amalgam of criticism and praise exemplifies the divergent societal responses to industries left mostly unregulated by existing legislation.

### A. *Airbnb as a Societal Boon*

Many users, both hosts and renters, welcome Airbnb as a boon to society. For many hosts, Airbnb offers the opportunity to earn a supplemental income.<sup>46</sup> This income helps hosts buy groceries, pay for utilities, and even allows hosts live in unique, culturally rich places they might not otherwise be able to afford. Additionally, renters get to visit places they might not otherwise be able to see. Finally, Airbnb’s biggest benefit might be the value that it adds to local economies. When renters

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42. *About NTIA*, NAT’L TELECOMM. & INFO. ADMIN., U.S. DEP’T OF COMMERCE, <http://www.ntia.doc.gov/about> (last visited Nov. 8, 2014).

43. *Exploring the Digital Nation: America’s Emerging Online Experience*, NAT’L TELECOMM. & INFO. ADMIN., U.S. DEP’T OF COMMERCE 17 (June 2013), [http://www.ntia.doc.gov/files/ntia/publications/exploring\\_the\\_digital\\_nation\\_-\\_americas\\_emerging\\_online\\_experience.pdf](http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_-_americas_emerging_online_experience.pdf).

44. *Id.*

45. *Id.*

46. Verena Dobnik, *New York City, Airbnb Battles Over Data, Short-Term Rentals*, NBC 4 NEW YORK (Oct. 15, 2013, 9:48 AM), <http://www.nbcnewyork.com/news/local/Airbnb-NYC-Data-Battle-227773671.html>.

stay at an Airbnb location, they are often staying in local neighborhoods, eating at local restaurants, and shopping at local vendors.<sup>47</sup> One study commissioned by Airbnb indicated that in San Francisco alone, Airbnb “generated \$56 million in direct and indirect spending in one year and supported 380 full-time equivalent jobs.”<sup>48</sup>

Airbnb not only adds economic value to local neighborhoods, but serves as a flexible vehicle for assisting those victimized by natural disasters, such as floods, fires, and hurricanes.<sup>49</sup> Following flooding in Colorado in 2013, Airbnb responded by waiving its fees. One flood victim commented on how much the home away from home was appreciated.<sup>50</sup> When Hurricane Sandy struck New York, some Airbnb hosts opened up their homes, offering free or discounted accommodations, to the hurricane’s victims.<sup>51</sup> Hotels, on the other hand, are large institutional actors. As such, they tend to be unwieldy when it comes to acting in the wake of natural disasters and providing fee waivers and price reductions.<sup>52</sup> By providing supplemental incomes, boosting local economies, and responding quickly to natural disasters, Airbnb offers a social boon that the hotel industry cannot rival.

### B. Criticism and the Call for Change

Criticism of Airbnb comes from many directions: angry hosts who found themselves the subjects of nasty lawsuits, fines, and eviction notices;<sup>53</sup> city officials who have received complaints from

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47. Press Release, Airbnb, Study Finds that Airbnb and Guests Have Major Positive Effect on City Economies (Nov. 9, 2012), [http://assets.airbnb.com/press/press-releases/Economic\\_Impact\\_Study.pdf](http://assets.airbnb.com/press/press-releases/Economic_Impact_Study.pdf) (describing study commissioned by Airbnb); *Economic Impacts of Airbnb*, HR&A, <http://www.hraadvisors.com/featured/economic-impacts-of-airbnb/> (last visited Nov. 16, 2014).

48. *Economic Impacts of Airbnb*, *supra* note 47.

49. *Coloradans Offering Homes to Those in Need* (ABC: 7News television broadcast Sept. 18, 2013, 9:08 PM), available at [http://www.youtube.com/watch?v=x902dtjN1YY&feature=c4-overview&list=UU-2MJIKSq9\\_pYk5-bdvMhnw](http://www.youtube.com/watch?v=x902dtjN1YY&feature=c4-overview&list=UU-2MJIKSq9_pYk5-bdvMhnw) (last visited Oct. 4, 2013). The flooding in Colorado is just one example of Airbnb’s response to natural disasters. In June 2013, Airbnb announced the release of its new Disaster Response Tool to help those in need of housing following natural disasters. Nathan Blecharczyk, *Getting Ready for Those in Need*, AIRBNB (June 11, 2013), <http://blog.airbnb.com/getting-ready-for-those-in-need/>.

50. Jack147, posting to *Colorado Charm*, Airbnb (Sept. 2013), <https://www.airbnb.com.sg/rooms/581589>.

51. Lauren Hockenson, *Airbnb Does Good, Dedicates a Section of Its Site to Disaster-Relief Housing*, GIGAOM (June 11, 2013, 1:52 PM), <http://gigaom.com/2013/06/11/airbnb-does-good-dedicates-a-section-of-its-site-to-disaster-relief-housing/>.

52. One group found that the rates for hotels surrounding the flooded Colorado areas actually surged in the following days. Chesley Price & Carter Wilson, *Impact on Hotels from Colorado Flooding*, HOTEL NEWS NOW (Oct. 14, 2013), <http://hotelnewsnow.com/Article/12443/Impact-on-hotels-from-Colorado-flooding>.

53. Ron Lieber, *A Warning for Hosts of Airbnb Travelers*, N.Y. TIMES (Nov. 30, 2012), <http://www.nytimes.com/2012/12/01/your-money/a-warning-for-airbnb-hosts-who-may-be->

neighborhoods where disrespectful renters have wreaked havoc;<sup>54</sup> and the hotel industry, which has threatened class action lawsuits.<sup>55</sup> Through lawsuits, blogs, and press releases, these individuals are voicing their concerns about the nebulous regulations surrounding Airbnb, and how they can be made whole after suffering damages.

Individually and as a group, Airbnb hosts have suffered the most from legal uncertainty. Although there are reported instances of inconsiderate guests,<sup>56</sup> they are not the focus of this note. Rather, the environment of regulatory uncertainty is of primary concern with its serious consequences for uninformed hosts. One New Yorker, similar to the Aruba vacationer in our hypothetical, faced fines of over \$40,000 a night and the possibility of eviction after renting out his apartment on Airbnb.<sup>57</sup> This New Yorker admitted to failing to read the terms and conditions on Airbnb's webpage prior to listing his apartment on Airbnb. Because of his own legal difficulties, he expressed the hope that Airbnb would explicitly warn consumers of the possibilities of violating local laws and city ordinances when hosting guests, rather than placing them solely in the terms of service.<sup>58</sup> Although he won his case on appeal with the New York City Environmental Control Board because his roommate was in the apartment at the time it was being rented out, the potential for future violations is huge.<sup>59</sup> The judge left unanswered what would happen to those who rent their accommodations while the host is not onsite.<sup>60</sup> Additionally, this case only settles the issue for New York residents. Hosts in other states are still left with uncertainty as to whether they can avoid liability by remaining onsite while renting a room in their apartment or house, or if they can leave the rented residence if they live in a different state.

On a more local scale, city officials pursue illegal hosting for a variety of reasons. In cities like New York, officials are concerned with

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breaking-the-law.html?pagewanted=all.

54. See *Airbnb 'Party House' in Glendale Shut Down after Complaints*, TAKE TWO (Jan. 8, 2014, 4:16 PM), <http://www.scpr.org/programs/take-two/2014/01/08/35423/airbnb-party-house-in-glendale-shut-down-after-com/>.

55. See, e.g., David Mills, *Airbnb Hit with Class-Action Lawsuit over Tenderloin Hotel Guests*, SAN FRANCISCO BUS. TIMES (Sept. 9, 2014), <http://www.bizjournals.com/sanfrancisco/blog/2014/09/airbnb-hit-with-class-action-lawsuit-over.html>.

56. Aditi Mukherji, *Top 5 Airbnb Home-Rental Horror Stories*, FINDLAW (June 1, 2013, 8:28 AM), [http://blogs.findlaw.com/law\\_and\\_life/2013/06/top-5-airbnb-home-rental-horror-stories.html](http://blogs.findlaw.com/law_and_life/2013/06/top-5-airbnb-home-rental-horror-stories.html).

57. Lieber, *supra* note 53.

58. *Id.*

59. Tomio Geron, *Airbnb Wins New York City Appeal on Short-Term Rentals*, FORBES (Sept. 27, 2013, 6:26 PM), <http://www.forbes.com/sites/tomiogeron/2013/09/27/airbnb-wins-new-york-city-appeal-on-short-term-rentals/>.

60. *Id.*

“fire safety and maintaining at least some availability of rental inventory for people who live there.”<sup>61</sup> Officials in the neighborhood of Silver Lake in Los Angeles, California, listed “noise, traffic and parking problems” as the impetus for cracking down on short-term rentals in the area.<sup>62</sup> These administrative issues are familiar to those following the regulatory crackdown on other businesses that rely on the sharing economy, such as Uber in the ride-sharing industry.<sup>63</sup> The issue of occupancy tax has also taken center stage in the news lately, with Airbnb announcing that it is open to working with city officials in New York and San Francisco to develop new legislation.<sup>64</sup> Airbnb co-founder, Brian Chesky, reinforces the idea that Airbnb “hosts are not hotels,” in his blog.<sup>65</sup> However, he went on to state that Airbnb is considering working with New York to develop laws regarding paying an “occupancy tax” with the goal of allowing Airbnb to spread to New York.<sup>66</sup>

Closely tied to the taxation issue is the hotel industry. Frustrated by Airbnb’s refusal to pay the same taxes and comply with the same laws as the hotel and bed and breakfast industries, hotel lobbyists have been one of Airbnb’s biggest opponents. In September 2013, hotel lobbyists announced they were preparing a class action lawsuit against Airbnb and its “unfair competition.”<sup>67</sup> Vijay Dandapani, the Chief Operating Officer of Apple Core Hotels in New York, stated, “We are not sitting still. They are violating the law and we are the affected class.”<sup>68</sup> Mr. Dandapani stated that an ideal outcome of the efforts to regulate Airbnb would be a “cease and desist order.”<sup>69</sup>

As the President of Apple Core Hotels, Mr. Dandapani is

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61. Lieber, *supra* note 53.

62. Walter Hamilton, *In Silver Lake, Some Have Reservations About Vacation Rental Website*, L.A. TIMES (Sept. 2, 2013), <http://articles.latimes.com/2013/sep/02/business/la-fi-airbnb-economy-20130903>.

63. In the ride-sharing industry, regulators cite issues like insurance compliance and the need for background checks in the newly created rules designed to regulate the ride-sharing industry. Sudhin Thanawala, *California’s New Car-Sharing Regulations Create a New Category for Businesses Like Lyft, Uber*, HUFFINGTON POST (Sept. 19, 2013, 7:39 PM), [http://www.huffingtonpost.com/2013/09/19/california-car-sharing-regulations\\_n\\_3957177.html](http://www.huffingtonpost.com/2013/09/19/california-car-sharing-regulations_n_3957177.html).

64. Verne Kopytoff, *Airbnb’s Woes Show How Far the Sharing Economy Has Come*, TIME (Oct. 7, 2013), <http://business.time.com/2013/10/07/airbnbs-woes-show-how-far-the-sharing-economy-has-come/>.

65. Brian Chesky, *Who We Are, What We Stand for*, AIRBNB (Oct. 3, 2013), <http://blog.airbnb.com/who-we-are/>.

66. *Id.*

67. Lisa Fickenscher, *Hotels Girding for a Fight Against Airbnb*, CRAIN’S NEW YORK BUSINESS (Aug. 19, 2013, 5:00 AM), [http://www.crainsnewyork.com/article/20130819/HOSPITALITY\\_TOURISM/](http://www.crainsnewyork.com/article/20130819/HOSPITALITY_TOURISM/).

68. *Id.*

69. Email from Vijay Dandapani, President and Chief Operating Officer of Apple Core Hotels, to author (Jan. 6, 2014) (on file with author).

responsible for staying abreast of regulatory issues that might affect the hotel industry on a macro level.<sup>70</sup> This includes responsibility for minimizing any adverse effects of regulatory decisions.<sup>71</sup> Voicing strong concern for New York City renters who utilize Airbnb's services, Mr. Dandapani stated that Airbnb operates in direct violation of New York state law, which "sets up guests and visitors for numerous safety hazards such as fire, workplace and security which hotels are well positioned to minimize if not eliminate."<sup>72</sup> Furthermore, he pointed out the economic benefit offered by hotels, such as the provision of jobs and accompanying benefits, "such as medical, pension, and vacation pay."<sup>73</sup>

Airbnb is not without its supporters. Peers, a new "grassroots" organization, arose to support the sharing economy movement on a political level.<sup>74</sup> But not everyone is optimistic about Peers's efforts and mission,<sup>75</sup> especially once it became known that organizations like Peers are pioneered and funded by peer-to-peer industry leaders, leaders who are "venture-capital-funded, profit-seeking organizations."<sup>76</sup> However, regular people have also joined to voice their support for Airbnb and other businesses in the sharing economy.

### III. REACTIONS AND RESPONSES TO THE LEGAL UNCERTAINTY SURROUNDING AIRBNB

The environment of legal uncertainty that led to Airbnb's exponential growth has also opened it to attack by its critics. Both state and local governments have attempted to regulate Airbnb through changes to local laws. Other agencies, such as the National Association of Attorneys General ("NAAG"), have broadened their strategy to include an attack on the foundational federal laws that give Internet platforms like Airbnb civil immunity.

#### *A. To Regulate or Not to Regulate: State Responses to § 230*

Existing laws could be modified to accomplish regulation in areas where existing and evolving technologies have had radical effects upon society, yet the technologies do not precisely fit under any existing

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70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. PEERS, <http://www.peers.org/> (last visited Nov. 13, 2014).

75. Andrew Leonard, *The Sharing Economy Gets Greedy*, SALON (July 31, 2013, 2:56 PM), [http://www.salon.com/2013/07/31/the\\_sharing\\_economy\\_gets\\_greedy/](http://www.salon.com/2013/07/31/the_sharing_economy_gets_greedy/) ("I don't know how one decides when asking a mayor for something is lobbying and when it isn't, and I really don't know how the word 'grassroots' applies to an organization that is at least partially funded by industry players.")

76. *Id.*

regulatory scheme.<sup>77</sup> In his review of the changing landscape of social media, Lothar Determann, citing the California Senate's quick passage and withdrawal of a proposed 2004 law restricting the placement of ads into emails, remarks that new laws are often unnecessary as existing laws usually prove open enough to encompass change.<sup>78</sup>

Airbnb is a company that evolved in a relatively sparse and outdated regulatory environment. Further, regulatory uncertainty played a large role in how the disputes amongst Airbnb and the Attorneys General and the hotel industry have arisen. § 230 provides a legal background against which Internet platforms like Airbnb can operate with some degree of legal certainty as to their liability for actions their users take. Modification of § 230 would disturb that foundation of legal certainty. If left alone, however, Airbnb's customers will continue to suffer from the legal uncertainty—specifically, fines and evictions. Airbnb's users have been attacked, and these attacks are often the only recourse for gaining the attention of a company that is immune from liability.

The Federal Trade Commission ("FTC") has come under fire lately for its rigidity when responding to changing technology.<sup>79</sup> However, there are indications that the FTC is looking to take a more active approach to regulating new sharing economy industries. It has been praised for championing Uber through proposed lawmaking in Washington, D.C.<sup>80</sup> In its letter to the General Counsel of the D.C. Taxicab Commission, the FTC urged the creation of laws that would encourage rather than stifle innovation in the transportation industry.<sup>81</sup> In its letter, the FTC emphasized the need for a more responsive, better tailored approach to new methods of competition and consumer protection: "A forward-looking regulatory framework should allow new and innovative forms of competition to enter the marketplace unless regulation is necessary to achieve some countervailing pro-competitive or other benefit, such as protecting the public from significant harm."<sup>82</sup> The FTC's approach to Uber should be extended to businesses like Airbnb, who are providing innovative competition in stagnant existing industries.

Specific to Airbnb, local governments should look to modifying

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77. Lothar Determann, *Social Media @ Work 2014*, 49 SOCIAL MEDIA LAW & POLICY REPORT (BNA), (2013).

78. *Id.* at 3 n. 13.

79. See Berin Szoka, *The Second Century of the Federal Trade Commission*, TECHDIRT (Sept. 26, 2013, 8:05 PM), <http://www.techdirt.com/blog/innovation/articles/20130926/16542624670/second-century-federal-trade-commission.shtml>.

80. *Id.*

81. Letter from FTC to Jacques P. Lerner, Gen. Counsel for D.C. Taxicab Comm'n 1 (June 7, 2013), available at <http://www.ftc.gov/os/2013/06/130612dctaxicab.pdf>.

82. *Id.* at 3.

existing housing and rental laws to regulate customers who abuse the Airbnb platform. The office of New York Attorney General Eric Schneiderman has stated that it is looking into “whether property managers or brokers are skirting the law by renting out large numbers of units, or whether some individuals are using apartments for transient guests for large portions of the year.”<sup>83</sup> Citing the manipulation of Airbnb by these property managers and brokers, Schneiderman has requested that Airbnb provide his office with data regarding its hosts,<sup>84</sup> an effort which Airbnb has so far resisted.<sup>85</sup> Although much of the popular media has focused on the extent to which Airbnb hosts have been sued by the city for violating local housing laws, there have been cases where Airbnb’s platform has been abused by slumlords who use Airbnb to evade local housing laws.<sup>86</sup> Schneiderman’s spokesperson stated, “Airbnb isn’t standing up for average New Yorkers who rent out their apartments from time to time—Airbnb is standing up for highly profitable, illegal businesses that make up a huge chunk of its corporate revenue.”<sup>87</sup>

### *B. Efforts to Regulate Airbnb by Changing Federal Law*

§ 230 of the Federal Communications and Decency Act was enacted in 1996. While the Internet has grown and evolved since then, the statute’s text remains unchanged. Because § 230 operates as a liability shield for Internet platforms like Airbnb, local and state governments possess only limited power to said Internet platforms in their interactions with consumers, and within larger and related industries. Consequently, many local and state agencies have focused their regulatory and enforcement powers on the users of platform services, instead of focusing on the actual companies as a result.

#### 1. Origins of § 230

§ 230 was enacted to confront the growing fears of leaders in the Internet industry that they would be held liable for illegal activities and postings by users that were beyond their control. Congress wrote § 230

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83. *Schneiderman Investigating Airbnb Users*, CRAIN’S N.Y. BUS. (Oct. 7, 2013, 2:21 PM), [http://www.crainsnewyork.com/article/20131007/REAL\\_ESTATE/131009911](http://www.crainsnewyork.com/article/20131007/REAL_ESTATE/131009911).

84. *Id.*

85. *Id.*

86. Sam Roudman, *Analysis Examines How Much Illegal Money Airbnb Makes in New York*, TECHPRESIDENT (Nov. 7, 2013), <http://techpresident.com/news/24513/analysis-examines-how-much-illegal-money-airbnb-makes-new-york>.

87. Elizabeth A. Harris, *The Airbnb Economy in New York: Lucrative but Often Illegal*, N.Y. TIMES, Nov. 4, 2013, at A22, available at [http://www.nytimes.com/2013/11/05/nyregion/the-airbnb-economy-in-new-york-lucrative-but-often-unlawful.html?\\_r=1&](http://www.nytimes.com/2013/11/05/nyregion/the-airbnb-economy-in-new-york-lucrative-but-often-unlawful.html?_r=1&).

to allay those fears, paying special attention to promoting the development of the Internet and preserving the competitive free market for Internet.<sup>88</sup> § 230 protects providers of an interactive computer service from civil liability for actions taken by others that would otherwise subject them to liability, such as posting obscene or harassing content.<sup>89</sup> It provides in pertinent part 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.”<sup>90</sup> It goes on to state that “[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.”<sup>91</sup>

But § 230 was enacted at a time when far fewer people used the Internet, or even owned computers.<sup>92</sup> Recently, § 230 has been criticized as an outdated model for Internet regulation. Protections designed with Internet Service Providers (“ISPs”) in mind have been extended to businesses built as Internet platforms. There have been calls from the NAAG to modify the language of § 230 to allow for states to regulate violations of any criminal laws that might normally fall under § 230 protection.<sup>93</sup> The NAAG serves as a forum for the sharing of ideas between Attorneys General in the various states and territories of the United States.<sup>94</sup> Its mission statement encapsulates its primary function: “[t]o facilitate interaction among Attorneys General as peers and to facilitate the enhanced performance of Attorneys General as peers and to facilitate the enhanced performance of Attorneys General and their staffs.”<sup>95</sup> The various state Attorneys General have joined together to fulfill that mission through their calls for modification of § 230.

## 2. § 230 and Escaping Civil Liability

§ 230 has been interpreted widely—including, in a variety of contexts, to essentially create federal immunity for ISPs.<sup>96</sup> For example,

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88. 47 U.S.C. § 230(b)(1) (1998).

89. 47 U.S.C. § 230(c)(2)(A).

90. 47 U.S.C. § 230(c)(1).

91. 47 U.S.C. § 230(e)(3).

92. See Farhood Majoo, *Jurassic Web: The Internet of 1996 Is Almost Unrecognizable Compared with What We Have Today*, SLATE (Feb. 27, 2009), [http://www.slate.com/articles/technology/technology/2009/02/jurassic\\_web.html](http://www.slate.com/articles/technology/technology/2009/02/jurassic_web.html) (just 20 million American adults had access to the Internet in 1996).

93. Letter from the National Association of Attorneys General to Senators Rockefeller & Thune and Representatives Waxman and Upton (July 23, 2013) (on file with author), available at <https://www.eff.org/sites/default/files/cda-ag-letter.pdf>.

94. *About NAAG: Information on the Association*, NAT'L ASSOC. OF ATTORNEYS GEN., [http://www.naag.org/about\\_naag.php](http://www.naag.org/about_naag.php) (last visited Nov. 16, 2014).

95. *Id.*

96. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4<sup>th</sup> Cir. 1997) (discussing how the plain language of §230 “creates a federal immunity to any cause of action that would make

“ISPs and other interactive computer services have used § 230 as a complete defense against recent suits brought by parents upset by child pornography marketed in ISP chat rooms, copyright owners against eBay for facilitating sales of infringing recordings, and taxpayers protesting the accessibility of pornography on public library computers.”<sup>97</sup>

Courts have also interpreted § 230 to reinforce the values of free speech and advancement of the Internet. In the 1997 case *Zeran v. American Online*, the Fourth Circuit confronted the issue of whether America Online (“AOL”) “unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter.”<sup>98</sup> In rejecting the plaintiff’s argument and holding that § 230 “immunizes computer service providers like AOL from liability for information that originates with third parties,”<sup>99</sup> the court reasoned that § 230 was enacted “to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”<sup>100</sup> The court also found that imposing tort liability would be “simply another form of intrusive government regulation of speech.”<sup>101</sup>

In more recent case law, the courts have continued to uphold the protection of the right to freedom of speech when conducted over the Internet.<sup>102</sup> Online dating websites have also been able to use § 230 to escape civil liability, even when the company provides questionnaires for its customers to fill out.<sup>103</sup> The court held that the company was not providing content by providing questionnaires that users filled out and the company published.<sup>104</sup>

Companies like eBay have used § 230 to escape liability as well. To find that a business qualifies for § 230 immunity, the law requires: “(1) the defendant be a provider or user of an interactive computer service; (2) the cause of action treat the defendant as a publisher or speaker of information; and (3) the information at issue be provided by another information content provider.”<sup>105</sup> The plaintiffs in the 2002 case *Gentry*

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service providers liable for information originating with a third-party user of the service”), *cert. denied*, 524 U.S. 937 (1998).

97. Paul Ehrlich, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 401-02 (2002).

98. *Zeran*, 129 F.3d at 328.

99. *Id.*

100. *Id.* at 330.

101. *Id.*

102. *See, e.g.*, *Giordano v. Romeo*, 76 So. 3d 1100, 1101-02 (Fla. Dist. Ct. App. 2011).

103. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (holding that online matchmaking service that provided customers with questionnaires was not an Internet content provider and thus was entitled to immunity from tort liability).

104. *Id.*

105. *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 714 (Cal. Ct. App. 2002).

*v. eBay* sued eBay for acting as a dealer of sports memorabilia.<sup>106</sup> The California Court of Appeals found that eBay was immune from liability under § 230, reasoning that eBay's "dissemination of representations made by the individual defendants, or the posting of compilations of information generated by those defendants and other third parties," falls under the protection of § 230.<sup>107</sup> Finding that eBay was not responsible for misinformation that originated from third parties under § 230, the court ruled that the plaintiffs were unable to state a cause of action in their case.<sup>108</sup>

Airbnb also qualifies for § 230 immunity under the test delineated in *Gentry*. Airbnb, like eBay, is a provider of an interactive computer service. In *Gentry*, the court found it extremely relevant that eBay itself did not fabricate the descriptions of the supposedly authentic memorabilia. The court, therefore, concluded that eBay was merely a publisher and qualified for § 230 immunity.<sup>109</sup> Similarly, Airbnb does not create the content on its website. It provides a forum for users to post their own content, which Airbnb merely facilitates. Thus, Airbnb meets all three prongs outlined in *Gentry* as the essential requirements for § 230 immunity.

### 3. § 230 and Airbnb

Airbnb has relied on § 230 to insulate itself from civil liability. Some have touted § 230 as one of the most influential reasons why Airbnb, among other online peer-to-peer businesses, can succeed.<sup>110</sup> The Digital Media Law Project is an organization dedicated to providing legal advice concerning journalism and information on recent legal issues in business law and the media.<sup>111</sup> In its amicus curiae brief, recently submitted to the Sixth Circuit in *Seaton v. TripAdvisor*, the Digital Media Law Project argued that § 230 immunizes TripAdvisor from liability. TripAdvisor faced liability for hosting a list of "Dirtiest Hotels." The Digital Media Project argued that the information was simply TripAdvisor's "opinion" based on facts disclosed by its users.<sup>112</sup> The authors of the brief further argued that by rendering a judgment

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106. *Id.* at 706.

107. *Id.* at 715.

108. *Id.*

109. *Id.* at 716.

110. *Section 230 Exemption Threatens Internet Commerce as Much as Speech*, NETCHOICE (July 30, 2013), <http://netchoice.org/section-230-exemption-threatens-internet-commerce-as-much-as-speech/>.

111. DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/> (last visited Nov. 2, 2014).

112. Brief of Amicus Curiae Digital Media Law Project Supporting Appellee & Urging Affirmance at 16, *Seaton v. TripAdvisor, LLC*, 728 F.3d 592 (6th Cir. 2013) (No. 12-6122), 2013 WL 864698.

against TripAdvisor, the court could “deter content providers from engaging in the synthesis and analysis of user-produced data, depriving the public of significant social benefits.”<sup>113</sup>

Like TripAdvisor, Airbnb also uses user-generated data to rank accommodations and hosts on its website. If courts create liability for this user-generated data, companies like Airbnb and TripAdvisor would have to individually verify every user comment posted on their websites, stifling the freedom of speech Congress hoped to protect when it passed § 230. Alternatively, companies might simply stop hosting such information. This would help them avoid setting up a painful administrative verification process for user-generated content. But it also endangers freedom of speech on the Internet. However, Airbnb may face an even larger § 230 problem in the future.

Airbnb’s critics see § 230 as one of the company’s weaknesses. The New York State Attorney General’s Office is currently looking for a way around § 230 to go after Airbnb for violations of local laws.<sup>114</sup> This effort is supported by the hotel industry, which, as stated earlier, views Airbnb’s business as an exercise in unfair competition.<sup>115</sup> The NAAG is one of § 230’s most prominent critics.<sup>116</sup> The NAAG calls for modification of § 230’s current treatment of violations of local laws.<sup>117</sup> In a letter to Congress, the NAAG cited difficulties in prosecuting and investigating online child sex trafficking as its main argument for amending § 230.<sup>118</sup> It proposes Congress add an exemption to § 230’s language for violations of state criminal laws. The statute currently only provides an exemption for federal criminal law violations: “Nothing in this section shall be construed to impair the enforcement of . . . any other Federal criminal statute.”<sup>119</sup> In the NAAG’s letter to Congress, mentioned earlier, the authors suggest that 47 U.S.C. § 230(e)(1) be amended to read: “Nothing in this section shall be construed to impair

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113. *Id.* at 22.

114. Fickenscher, *supra* note 67; see also Joshua Brustein, *Why Airbnb’s Legal Victory Isn’t the End of its Problems in New York*, BLOOMBERG: BUSINESSWEEK (Oct. 1, 2013), <http://www.businessweek.com/articles/2013-10-01/why-airbnbs-legal-victory-isnt-the-end-of-its-problems-in-new-york> (discussing potential future action by the state attorney general).

115. Fickenscher, *supra* note 67.

116. Eric Goldman, *The State Attorneys General Want to Eviscerate a Key Internet Community*, FORBES (June 26, 2013, 3:43 PM), <http://www.forbes.com/sites/ericgoldman/2013/06/26/the-state-attorneys-general-want-to-eviscerate-a-key-internet-immunity/>.

117. Letter from Chris Koster, Att’y Gen. of MO, et al., to Sen. John Rockefeller IV, et al. (July 23, 2013), *available at* <http://www.naag.org/assets/files/pdf/signons/Final%20CDA%20Sign%20On%20Letter.pdf> (representing the NAAG’s desire to amend § 230 to better allow prosecution of online child sex crimes).

118. *Id.*

119. 47 U.S.C. § 230(e)(1) (1998).

the enforcement of . . . any other Federal *or State* criminal statute.”<sup>120</sup>

Although the NAAG says that any change to § 230 would focus on advertisements for prostitution,<sup>121</sup> it would have a huge impact on numerous other online platforms. Many other legitimate businesses would be impacted, including Uber, eBay, and Airbnb. Changing the law on which Internet platforms rely for immunity from defamation suits and tort liability cannot be the only way to combat and investigate illegal undertakings.

Many of the risks posed by the NAAG’s suggested modification of § 230 were outlined above. These risks include stifling entrepreneurship by making website operators who rely on user-generated data criminally liable, and/or creating the chance that the government and private actors might succeed in holding businesses like Airbnb liable for the content posted on their sites by users. Both risks are serious enough to halt the growth of the sharing economy if realized.

If § 230 is amended as the NAAG suggested, online entrepreneurial development could be slowed. Airbnb serves as a gold standard for entrepreneurs looking to “make it big.” According to Adam Sartariano, a ten percent stake in Airbnb is worth roughly \$250 million.<sup>122</sup> Others have hypothesized that Airbnb will soon surpass hotel giants Hilton and Intercontinental in terms of rooms for rent and occupancy rates.<sup>123</sup>

Part of that success is based on the civil immunity § 230 provides to Airbnb and similar Internet platforms. If § 230 is modified as the NAAG has proposed, entrepreneurs could face state criminal liability. Entrepreneurs already undertake a large amount of risk in starting a business.<sup>124</sup> The additional liability might be more than entrepreneurs are willing to tolerate.<sup>125</sup> State criminal laws can vary greatly, posing risks to entrepreneurs. Entrepreneurs would need to be aware of the various criminal laws and ensure they were in compliance by taking steps to monitor user-generated content on which their business models rely.

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120. Letter from Chris Koster, *supra* note 117.

121. Goldman, *supra* note 116.

122. Adam Satariano, *The Missed Airbnb Investment, Now Worth \$250 Million*, BLOOMBERG (March 10, 2013, 2:36 PM), <http://go.bloomberg.com/tech-deals/2013-03-10-the-missed-airbnb-investment-now-worth-250-million/>.

123. Andrew Cave, *Airbnb Plans to Be World’s Largest Hotelier*, THE TELEGRAPH (Nov. 16, 2013, 9:30 PM), <http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/leisure/10454879/Airbnb-plans-to-be-worlds-largest-hotelier.html>.

124. See, e.g., Deborah Gage, *The Venture Capital Secret: 3 Out of 4 Startups Fail*, WALL ST. J. (Sept. 20, 2012, 12:01 AM), <http://online.wsj.com/news/articles/SB10000872396390443720204578004980476429190>.

125. Eric Goldman, *Why the State Attorneys General’s Assault on Internet Immunity is a Terrible Idea*, FORBES (June 27, 2013, 10:44 AM), <http://www.forbes.com/sites/ericgoldman/2013/06/27/why-the-state-attorneys-generals-assault-on-internet-immunity-is-a-terrible-idea/>.

However, there might also be accompanying benefits in adopting the rule proposed by the NAAG. As mentioned in the NAAG's letter, modification of § 230 would help with the enforcement of local criminal laws, like those relating to prostitution and child trafficking.<sup>126</sup> An additional benefit might be the certainty in law enforcement that the NAAG's proposed rule could provide. However, this certainty is limited. As mentioned earlier, criminal laws vary across the states and can be a mysterious bog for early-stage entrepreneurs to wade through. Additionally, any time that a law is changed, several years of judicial interpretation are necessary before precedent is established. This leaves consumers and industries unprotected in the interim—many of whom may have based their business models on a potentially unstable business concept under the evolving law.

### C. *Accept the Status Quo: Leave Airbnb Unregulated*

There is also the possibility of keeping § 230 and all other laws as they currently exist. This would leave Airbnb and its users in the status quo of legal uncertainty, putting consumers at the mercy of local laws while Airbnb avoids responsibility for its users.

Many of § 230's proponents argue that the statute and its protections should be left alone. They claim that if its protections are modified or terminated, popular online businesses will be forced to close. Wikipedia is one example of an online business that relies heavily on § 230 immunity.<sup>127</sup> Legal counsel from the Wikimedia Foundation, the nonprofit that manages Wikipedia, stated that if § 230's protections were completely eliminated, the site would no longer exist because of the cost involved in defending lawsuits.<sup>128</sup> Some of § 230's proponents go further by suggesting that if § 230 is altered, online innovation will be stunted altogether.<sup>129</sup>

Others argue for the preservation of § 230 from a more theoretical viewpoint. Brian Holland, a professor of law, proposed that by preventing the imposition of certain legal constraints in the realm of the Internet, § 230 has promoted certain ideals, such as modified exceptionalism, that are important to our society.<sup>130</sup> He defines this form

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126. Letter from Chris Koster, *supra* note 117.

127. Adi Kamdar, *CDA 230 Success Cases: Wikipedia*, ELEC. FRONTIER FOUND. (July 26, 2013), <https://www EFF.ORG/deeplinks/2013/07/cda-230-success-cases-wikipedia> (interviewing with Michelle Paulson, legal counsel for Wikimedia).

128. *Id.*

129. Mike Masnick, *State Attorneys General Want to Sue Innovators 'For the Children!'*, TECHDIRT (July 24, 2013, 1:08 PM), <https://www.techdirt.com/blog/innovation/articles/20130724/12345123927/state-attorneys-general-want-to-sue-innovators-children.shtml>.

130. H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating*

of exceptionalism, as one in which the Internet is not confined by physical boundaries or sovereign governments, allowing the formation of new communities generating new “norms of relationship, thought and expression.”<sup>131</sup> He further proposed that tort liability serves as an external norm of conduct. Without imposition, the Internet society is free to form its own norms within the existing legal structure.<sup>132</sup> He goes further than arguing for preservation of § 230, instead calling for its expansion.<sup>133</sup> In making this argument for expansion, he argues that such an expansion of § 230 immunity will lead to a more collaborative and efficient economy.<sup>134</sup>

As demonstrated by Nigel Warren’s account—the man on whom the Aruba vacationer hypothetical was based—this would leave consumers open to more risk than major industry leaders like Airbnb face.<sup>135</sup> Such industry leaders would continue to operate virtually unregulated. Ultimately, the question of whether regulatory change is necessary is a question of who should bear the costs of regulation: consumers or industries. Leaving the industry unregulated harms cities and its occupants, who are deprived of the revenue provided by occupancy taxes. However, the individual victimized the most is the consumer. The individual user of Airbnb and other Internet platforms is the one who is left to untangle and attempt to comprehend the variety of local laws which could subject them to liability. Although these laws may be targeted at undermining the businesses who are evading liability on other fronts, the individual consumer is left facing the consequences in the end.

By fighting regulation and refusing to cooperate with city authorities, companies like Airbnb may be ultimately harming themselves as well. As individual consumers of their services are injured, the injury builds mistrust, undermining one of the central tenets of the sharing economy: trust itself.<sup>136</sup>

#### IV. PROPOSED SOLUTION

Examining the totality of circumstances, particularly the risk posed to the public, Airbnb must be regulated. Although § 230 poses a convenient vehicle for enacting change and imposing structure, it would hamper the pace of innovation to an unacceptable extent. Some regulatory middle ground must be reached in the regulation of Internet

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*Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369 (2008).

131. *Id.* at 370.

132. *Id.*

133. *Id.*

134. *Id.* at 391.

135. Lieber, *supra* note 1.

136. White, *supra* note 8.

platforms.

The sharing economy is a booming industry: in 2013, it generated an estimated \$3.5 billion in revenue.<sup>137</sup> Trust is the primary asset of businesses in the sharing economy. If consumers can no longer trust businesses like Airbnb, the sharing economy's most basic principle is undermined. The varied societal perceptions of Airbnb demonstrate the decreased trust that consumers are placing with the company. Proponents of Airbnb argue that the ability to rent out homes, apartments, and spare rooms provides a necessary service and income in areas where it is increasingly expensive to live. Critics, have voiced their opinions with equal vigor. Not only are the hotel industry and city officials upset with Airbnb for its failure to comply with local laws and taxes, but users themselves are becoming increasingly upset with the legal hassle posed by renting rooms in some cities. The Aruba vacationer hypothetical exemplified the legal hassle increasingly faced by hosts.

Altering § 230 served as an easy answer for those looking to reform the regulatory scheme for businesses operating as Internet platforms, because of the broad immunity it grants them. In the past, § 230 has been criticized for failing to provide a workable test for ISPs and courts to use in business development and litigation.<sup>138</sup> § 230 was based on an Internet completely unlike the one that exists today. Far fewer people had personal computers and the scope of business conducted online was much more limited. Online community marketplaces are a new phenomenon, and lawmakers in 1996 could not have contemplated the extent to which the Internet would grow over the next few decades. Additionally, reforming § 230 appeals as a way to help combat prostitution and child trafficking that occurs online. However, reforming § 230 offers its own problems. Adopting the NAAG's proposed rule might expose entrepreneurs and online businesses to an enormous range of criminal liability and expensive litigation. The additional expense and risk might be so prohibitive as to severely reduce the current rate of innovation. Leaving the regulatory scheme unchanged is not an option because it pushes the cost of regulatory uncertainty onto consumers.

The remaining option is to find a way to regulate Internet platforms, like Airbnb, under existing laws. Existing housing and zoning laws are a good area in which to begin regulation of the peer-to-peer rental business. If the state Attorneys General are concerned about users

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137. Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Jan. 23, 2013, 7:00 AM), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/>.

138. Bryan J. Davis, Comment, *Untangling the "Publisher" Versus "Information Content Provider" Paradox of 47 U.S.C. § 230: Toward a Rational Application of the Communications Decency Act in Defamation Suits Against Internet Service Providers*, 32 N.M. L. REV. 75, 92 (2002).

abusing the Airbnb platform to take advantage of other consumers, local laws should be tailored to that effect. David Chiu, member of the San Francisco Board of Supervisors, reasoned that users might find existing laws, such as those regulating bed and breakfasts, too onerous when it comes to registration and compliance.<sup>139</sup> Further, he suggested that San Francisco may modify its existing bed and breakfast laws to make it easier for users who currently turn to Airbnb to choose a legally secure option.<sup>140</sup>

This solution should be reevaluated in several years. A piecemeal approach to regulation may be effective where it is undertaken—but because it is piecemeal, this form of regulation still leaves many consumers without protection, unless they demand it of their legislators. Further, the exact form that any legislation would take is unknown. Such may be inadequate to deal with all of the NAAG’s concerns about Internet platforms generally. Starting at the level of local zoning and housing laws leaves Internet platforms operating in other industries with all of the protections afforded by § 230.

The FTC might also take a greater role in encouraging flexibility in the regulation of new industries. As mentioned earlier, the FTC has taken a pro-innovation approach to peer-to-peer ride-sharing companies, while still maintaining the importance of safety and legal compliance. By adapting current laws to new industries with a regulatory body that is able to respond quickly and easily to change, consumers and industries alike are left better protected in a rapidly changing society.

## CONCLUSION

The online peer-to-peer business model exists in a state of limbo. The threat of a class action lawsuit against Airbnb and NAAG’s efforts to amend § 230 illustrate the threat that existing industries and lawmakers find in unregulated area. Unable to attack the businesses that pose the threat, law enforcement has pursued product users instead. As more users are threatened and punished, the sharing economy businesses will lose the trust of the consumers on which their businesses are based. By using existing laws in new ways, local and state governments will be able to quickly adapt and respond to the rapid pace of technological change that impacts its citizens on a daily basis.

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139. Carolyn Said, *Airbnb Vacation Rentals Irk San Francisco Neighbors*, THE SEATTLE TIMES (June 14, 2012, 11:34 AM), [http://seattletimes.com/html/travel/2018432240\\_sublets17.html](http://seattletimes.com/html/travel/2018432240_sublets17.html).

140. *Id.*