Airbnb: A Case Study in Occupancy Regulation and Taxation

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INTRODUCTION

Six years after its founding, Airbnb stands as one of the most prominent participants in the sharing economy, a group that includes compatriots such as Uber and Lyft. These companies offer a variety of Internet-based platforms and applications that create new ways for people to share goods and services with one another on a previously unimaginable scale. They also act like virtual matchmakers by lowering transaction costs and facilitating arrangements that might otherwise have been too burdensome. Doing so has vast potential to benefit consumers by encouraging collaborative consumption of assets like cars and homes that are expensive to purchase but often remain idle because their owners cannot make full use of them. Although these companies are still in their nascent stages, they are growing rapidly, and their collective revenue was estimated to be in excess of $3.5 billion last year.

Sharing-economy companies offer a wide variety of services but are united by three common traits. First, they rely on recent technological advances to satisfy age-old consumer demands in ways not previously possible. Second, they exist in and parallel to a wide variety of well-established industries that are fundamentally disrupted by the sharing economy’s emergent ability to

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Although the authors have represented Airbnb in litigation matters, the views expressed here are their own and do not represent those of Airbnb.


3 Tomio Geron, The Share Economy, 191 Forbes 58, 60 (Feb 11, 2013).

4 See Mitchell, Uber, Airbnb (cited in note 2).
provide innovative alternatives. Third, they operate in interstitial areas of the law because they present new and fundamentally different issues that were not foreseen when the governing statutes and regulations were enacted.

This Essay discusses some of the specific issues that have confronted Airbnb, with a particular focus on New York, one of its largest markets. Part I discusses the impact that Airbnb has had on local communities. Part II focuses on the legal regime within which Airbnb operates—one that is marked by poorly drafted laws that fail to account for challenges presented by the sharing economy. Lastly, Part III addresses Airbnb’s collaborative response to the New York attorney general, who sought access to the company’s user data in order to investigate possible illegal hotels operating in New York.

I. THE IMPACT OF AIRBNB

Over the course of its brief existence, Airbnb has experienced exponential growth. Today, it hosts more than one million listings in over 190 countries and territories around the world. In addition to offering guests individual accommodations that range from tree houses to castles and everything in between, Airbnb makes efforts to partner with localities and organizers hosting large-scale events ranging from shareholder conferences to the Olympics and the World Cup.

Airbnb also contributes to local communities in myriad ways. Perhaps the most obvious and easiest to measure is its economic impact. One study found that 400,000 Airbnb guests who visited New York City between 2012 and 2013 spent $632

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6 See Kaplan, Regulation and the Sharing Economy (cited in note 1).
million, supporting 4,580 jobs.\textsuperscript{10} As compared to tourists staying in hotels, Airbnb guests in New York City tend to stay two days longer and spend nearly $200 more at local businesses during their visit.\textsuperscript{11} Part of what allows for this, of course, is that Airbnb helps guests find a variety of accommodations at a lower price point than what is available at expensive hotels.\textsuperscript{12} Moreover, the rise in economic activity has been widely dispersed: while the vast majority of New York City hotels are clustered in midtown Manhattan, as of 2013, 82 percent of Airbnb accommodations were spread across the rest of the city.\textsuperscript{13} Though New York remains Airbnb's largest market, similar results have been found elsewhere.\textsuperscript{14}

Of course, Airbnb's impact is not merely financial. One of the primary benefits that it provides is that it allows guests to "live like a local" and explore neighborhoods that do not typically cater to tourists, both by providing accommodations in a wide variety of locales and by connecting visitors with local residents.\textsuperscript{15} It has also exhibited a strong philanthropic streak.


\textsuperscript{11} New Study: Airbnb Generated $632 Million (cited in note 10).


\textsuperscript{15} See Economic Impact (cited in note 10); Peer-to-Peer Rental, Economist at 9 (cited in note 2); Julie Vollone, Airbnb Valued above Hyatt, Wyndham, Investor's Business Daily A5 (June 30, 2014); Carolyn Said, How an Airbnb Dabbler Became a Superhost (San Francisco Chronicle June 14, 2014), online at http://www.sfchronicle.com/realestate/article/How-an-Airbnb-dabbler-became-a-superhost-5553297.php (visited Feb 23, 2015); Jason Tanz, How Airbnb and Lyft Finally Got Americans to Trust Each Other (Wired
which includes participating in community-service projects and aiding in relief efforts around the world by providing free housing to victims of natural disasters.

Airbnb’s growth does not necessarily come at the expense of the hotel industry. Rather, Airbnb can grow the overall pie and allow a wide variety of businesses to obtain a larger slice. As recognized by SF Travel, some cities may be prohibitively expensive for certain visitors and during some events. By providing affordable accommodations, Airbnb ensures that such tourists and attendees are not priced out. That lack of actual competition between Airbnb hosts and the hotel industry may explain why one study, focusing on the Texas market, projected that a 1 percent increase in Airbnb listings results in only a 0.05 percent decrease in hotel revenues.

Similarly unavailing are complaints that Airbnb’s growth has increased housing costs for local residents. According to one study, Airbnb has “little effect on urban apartment markets,” for which prices are driven by fundamental economic and demographic factors, as well as constraints such as land-use policy that curtail residential development. Rather, Airbnb serves to make housing more affordable: half of current Airbnb hosts, many of whom are moderate- to low-income individuals, have explained that hosting helps them afford to stay in their


See generally Jacob Weisberg, Tech Support, Vogue 98 (May 2014).


See id.


Id. at *1.
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homes. Indeed, an independent study by the San Francisco Chronicle confirmed that 86 percent of Airbnb users in San Francisco had only one residence listed, and 98 percent had three or fewer, suggesting that only a miniscule proportion of users seek to operate on a commercial scale. Back in New York City, the typical host earns only $6,160 per year via Airbnb, an amount sufficient to bolster her budget but far too low to decrease the availability of housing in a city where the average monthly rent is nearly $3,300.

II. THE POLITICAL AND REGULATORY ENVIRONMENT

Airbnb's rapid growth makes clear that its Internet platform benefits its guests, its hosts, and their local communities alike. Indeed, in a recent poll of New York City residents, a majority of voters expressed that they support Airbnb, responding that residents should be permitted to rent rooms in their homes for a few days at a time, with only 36 percent opposed. Yet Airbnb hosts face strong headwinds from a well-funded coalition of landlords and hotel-industry insiders, which plans to spend millions of dollars on a public campaign criticizing Airbnb. One large landlord went so far as to consider offering $500 bounties to employees who identify Airbnb hosts in the landlord's buildings. Amply demonstrating the coalition's deep political connections, it is spearheaded in New York City by a prominent landlord...

22 See Economic Impact (cited in note 10).
political consultant who previously served as chief of staff to the
New York attorney general, political strategist for the Hotel and
Motel Trades Council, and chief strategist for the successful
reelection campaign of New York's governor.\textsuperscript{28}

As is typical, incumbent interests have sought to portray
Airbnb and its ilk as “‘evading’ established systems of regula-
tion,” though “this is true only in the sense that the automobile
‘evaded’ the horse tax and saddle regulations.”\textsuperscript{29} As explained by
Airbnb cofounder Brian Chesky, “There were laws created for
businesses, and there were laws for people. What the sharing
economy did was create a third category: people as businesses,”
to which the application of existing laws is often unclear.\textsuperscript{30} These
new business models raise complex questions that have not yet
been addressed by either legislatures or courts.\textsuperscript{31}

Airbnb has, however, begun to address these regulatory
challenges. As a first step, Airbnb takes efforts to ensure that its
users are aware of the regulatory and legal regimes in which
they operate. Because Airbnb operates in hundreds of countries,
territories, and cities, it may not be practical for Airbnb to in-
form users of the potentially applicable laws in each jurisdiction
where its hosts offer accommodations. Rather, upon reading
Airbnb’s Terms of Service, users are immediately informed, in
all capitalized lettering:

\begin{quote}
IN PARTICULAR, HOSTS SHOULD UNDERSTAND HOW
THE LAWS WORK IN THEIR RESPECTIVE CITIES.
SOME CITIES HAVE LAWS THAT RESTRICT THEIR
ABILITY TO HOST PAYING GUESTS FOR SHORT
PERIODS. THESE LAWS ARE OFTEN PART OF A CITY’S
ZONING OR ADMINISTRATIVE CODES. IN MANY
CITIES, HOSTS MUST REGISTER, GET A PERMIT, OR
\end{quote}

\textsuperscript{28} See Rubinstein, *Officials Kick Off Airbnb Counteroffensive* (cited in note 26) (noting
that consultant Neal Kwatra “is spearheading the anti-AirBnB effort”); Kenneth Lovett,
*Gov. Cuomo Builds Reelection Campaign Team That Includes Ad Whiz behind Dante de
Feb 23, 2015); Laura Nahmias, *As Schneiderman Probes Airbnb, Hotel Industry Donates*

\textsuperscript{29} Kaplan, *Regulation and the Sharing Economy* (cited in note 1).

\textsuperscript{30} Andy Kessler, *The Weekend Interview with Brian Chesky: The ‘Sharing Economy’

Hosts are further informed that there may be applicable taxes, which it is their duty to pay. Airbnb also provides guidance regarding responsible hosting and, for certain key cities, directs hosts to relevant laws and regulations.

Taxation and housing laws are at the forefront of the regulatory and legal issues that Airbnb faces, as aptly demonstrated by recent challenges to Airbnb’s operations in New York City. First, like many municipalities, New York City charges a 5.875 percent hotel room occupancy tax, which accounts for approximately 1 percent of its tax revenue. New York City’s Department of Finance has clarified that Airbnb is not required to collect or remit the city’s hotel room occupancy tax because, by providing a platform for hosts and guests to privately contract for available accommodations, Airbnb “is neither a hotel operator nor a room remarketer.” It remains unclear, however, whether that tax might apply to some of Airbnb’s New York City users.

Airbnb has sought to clarify this open question, taking the position that although its hosts do not technically qualify as

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33 Id.
35 NYC Admin Code § 11-2502. See also NY Tax Law § 1104 (imposing a $1.50 fee per day for occupancies of hotel units in cities with more than one million residents).
38 See Airbnb, Inc v Schneiderman, 44 Misc 3d 351, 358, 360 (NY Sup 2014) (noting that the New York City hotel room occupancy tax may apply to Airbnb hosts but finding the issue not ripe for review).
hoteliers, the Airbnb community should nevertheless pay its fair share of taxes, with limited exemptions for those hosts who earn under a certain threshold.39 Indeed, in an era when many large corporations take extreme measures to avoid taxation,40 Airbnb instead petitioned New York City to allow it to help facilitate collection and remittance of more than $20 million in estimated occupancy taxes from its hosts annually, as it already does in several other American cities41 and which it cannot currently do under existing New York law.42 The hotel industry has stiffly resisted Airbnb’s voluntary efforts to facilitate tax collection on behalf of its hosts, despite having initially criticized the company for escaping the same taxes that Airbnb now seeks to pay.43 This reversal suggests that the industry’s opposition is rooted in protectionism rather than principle.

Second, and similarly, under a law enacted in 2010, New York restricts certain types of housing to use “only . . . for permanent residence purposes.”\(^{44}\) It provides an exception, however, for “house guests or lawful boarders, roomers or lodgers,” so long as such temporary occupants remain for fewer than thirty days.\(^{45}\) Because of the law’s recent vintage, there is a paucity of case law providing guidance as to how this exception is to be interpreted. In the only case applying it thus far, however, the New York City Environmental Control Board applied the express wording of the statute in holding that an Airbnb user did not violate the occupancy law because it “expressly allows a paying, lawful boarder, roomer, or lodger . . . to live a few days within the household of . . . the permanent occupant” and does not require that “such individuals […] have a personal relationship with the permanent occupants of the residence.”\(^{46}\)

This interpretation comports with the occupancy law’s legislative history and intent. The law was passed in 2010, only one year after Airbnb first entered the New York market, and was responsive to an issue that predated Airbnb’s existence. The issue involved “illegal hotels”: certain landlords sought to evict tenants from their apartments in order to remove that housing stock from the rental market and operate it as full-time transient housing.\(^{47}\) Indeed, the legislation’s primary sponsor, New York State Senator Liz Krueger, has repeatedly explained that it was not intended to target Airbnb or its users. In her own words, “If you’re renting out your apartment for a couple of days, this was not designed to target you. . . . Somebody is going somewhere, and someone else needs a place to stay, so you make a deal—those patterns have happened forever. That’s not the problem.”\(^{48}\)

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\(^{44}\) NY Mult Dwell Law § 46(9)(a).

\(^{45}\) NY Mult Dwell Law § 46(9)(b)(1)(A).


Recognizing the ambiguity that was introduced by the 2010 occupancy law and seeking to remedy it, two bills have recently been introduced in New York’s legislature. The first bill would clarify the legality of individuals renting out their apartments while away on vacation. The bill expressly recognizes that doing so “provid[es] tax revenue and tourism dollars to the state and city.” The second bill would provide an explicit exemption allowing New Yorkers to rent out their primary or secondary residences for periods of up to thirty days to “help [them] make ends meet and earn extra income” and to “bring exponential economic benefits to both New York City’s residents and its visitors.”

Airbnb has advocated for these measures despite vehement political opposition. Airbnb has similarly supported analogous legislation elsewhere, such as in its hometown of San Francisco, which recently approved legislation that will explicitly legalize and regulate the city’s short-term rental market.

III. COLLABORATION, NOT CONFRONTATION

Airbnb prides itself on having been “founded on the belief that housing should be more accessible, more affordable, and

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more available. Accord ingly, Airbnb strongly opposes illegal hotel operators. Rather than seeking to protect such bad actors, it has acted swiftly to ensure that these illegal hotel operators are not allowed to benefit from access to Airbnb’s platform and users. Indeed, Airbnb boasts of having voluntarily examined its own user base and unilaterally removed thousands of such hosts earlier this year because it felt that they were abusing the Airbnb platform, harming their neighborhoods, and failing to provide quality accommodations.

Airbnb has similarly sought to comply with an investigation by New York Attorney General Eric Schneiderman into possible violations of state law. Though early clashes between Airbnb and Schneiderman made for sensationalized headlines, the press overemphasized what was, in reality, a minor dispute. Just as the occupancy law’s sponsors intended, Schneiderman has repeatedly made clear that he is focused on illegal hoteliers rather than people who rent out their primary residence for a night or two while out of town. When Schneiderman initially subpoenaed user data from Airbnb, Airbnb argued that the subpoena was overbroad, and Justice Gerald Connolly of the New York Supreme Court agreed, quashing it. That very same day,

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55 See Chesky, Who We Are (cited in note 39); Hantman, New York, New York (cited in note 52).

56 See Papas, Hotels vs. Regular New Yorkers (cited in note 54).


however, Airbnb made clear that it hoped to “continue working with the Attorney General’s office to try to address his legitimate concerns.”

When a more narrowly tailored subpoena was subsequently issued, Airbnb entered into negotiations with Schneiderman to further limit the subpoena’s scope. An agreement was eventually reached that allowed Airbnb to protect the vast majority of its users’ privacy while also complying with the subpoena: Airbnb would provide Schneiderman with an anonymized version of the data that he had requested and, upon review of the anonymized data, Schneiderman could then request the identity of specific users.

Schneiderman subsequently requested information for approximately 125 of Airbnb’s New York hosts—the vast majority of whom were no longer active Airbnb hosts—representing far less than 1 percent of Airbnb’s New York hosting community. By entering a constructive dialogue and seeking to cooperate with Schneiderman, both parties were able to protect and advance their interests.

Moreover, this agreement offers a positive model for other innovative sharing-economy companies because it demonstrates that confrontation often is not the best approach to take with regulators. It proves that tech start-ups can continue to grow and expand while effectively collaborating with government officials and other stakeholders rather than seeking to ignore or confront them. The sharing economy’s interests are not antithetical to the public weal.

CONCLUSION

Because the threat of enforcement actions can have a chilling effect on start-ups and their users, state and local government officials should consider how their actions may affect burgeoning businesses. Officials should encourage the sharing economy’s
growth through collaborative efforts rather than seek to protect incumbent businesses. As Ned Ludd’s followers learned long ago, technological innovation is not easily halted.