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# Host at Your Own Risk: Monitoring the Legality of Airbnb Rentals at the Platform Level

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*Host at Your Own Risk: Monitoring the Legality of Airbnb Rentals at the Platform Level*  
by  
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Submitted in partial fulfillment of the requirements of the  
King Scholar Program  
Michigan State University College of Law  
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HOST AT YOUR OWN RISK: MONITORING THE LEGALITY OF AIRBNB RENTALS AT  
THE PLATFORM LEVEL

*Autumn C. Gear*

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## INTRODUCTION

After finally deciding to take a long needed vacation, instead of booking a hotel for your stay, you decide to utilize the sharing economy to both save money and stay in a more residential environment.<sup>1</sup> You book your stay through Airbnb because this service allows you to reserve an entire house for a week for the same or even less than the cost of a hotel.<sup>2</sup> Once your vacation comes around, you travel to your Airbnb rental; however, upon arrival, you know that something is not right because no one is home to give you the keys to your hotel alternative. Luckily, you are able to contact Airbnb's 24/7 help service, and they assist you in finding another rental in the area.<sup>3</sup> Despite the rocky start, your vacation continues and you eventually go home, happy that you chose to book an alternative accommodation.<sup>4</sup>

But what happened to your original host? Turns out, the host was renting his home in violation of local housing regulations because he needed the income to continue paying his rent.<sup>5</sup> When his landlord found out, eviction proceedings began and the host was evicted prior to your stay.<sup>6</sup> Airbnb did not assist the host because it disclaims liability when hosts fail to abide by state and local housing regulations.<sup>7</sup> So while Airbnb assisted you in finding a new Airbnb rental, the alternative accommodations company did not assist your original host in navigating through the regulations governing whether he could be an Airbnb host.

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<sup>1</sup> Georgios Zervas, David Proserpio & John W. Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* 30 (Bos. Univ. Sch. of Mgmt. Research Paper No. 2013-16, Jan. 27, 2016) ("The sharing economy has recently emerged as a viable alternative to fulfilling a variety of consumer needs, ranging from prepared meals to cars to overnight accommodations, that were previously provided primarily by firms rather than entrepreneurial individuals.").

<sup>2</sup> AIRBNB, <https://www.airbnb.com/> (last visited May 7, 2016).

<sup>3</sup> *Trust & Safety*, AIRBNB, <https://www.airbnb.com/trust> (last visited May 7, 2016).

<sup>4</sup> This hypothetical scenario is based in part on *Horror Stories*, SHARE BETTER, <http://www.sharebetter.org/airbnb-horror-stories/> (last visited May 7, 2016).

<sup>5</sup> Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103, 107 (2015); see *infra* Subsection II.C.1.

<sup>6</sup> See *infra* Subsection II.C.1.

<sup>7</sup> *Terms of Service*, AIRBNB, <https://www.airbnb.com/terms> (last visited May 7, 2016).

Airbnb disclaims itself from an obligation to protect hosts from local regulations, as well as their lease agreements.<sup>8</sup> Further, when hosts face fines and possible eviction as a result of violating these regulations, Airbnb avoids liability not only because of its disclaimer but also because of the protection granted to it by the Communications Decency Act.<sup>9</sup> Therefore, Airbnb hosts are left to navigate local regulations on their own, a situation that can result in unanticipated legal repercussions.<sup>10</sup> To prevent hosts from violating state and local housing regulations, Airbnb should take social responsibility for monitoring the legality of its rental units.<sup>11</sup>

This Note explores the effects of Airbnb's disclaimer of liability for hosts' violations of state and local housing regulations and presents different methods of promoting platform-level liability for illegal Airbnb rentals. Ultimately, this Note suggests that self-accountability sparked by social pressure is the best method to promote the alternative accommodations platform to monitor hosts' compliance with local regulations. This Note begins with a brief introduction to the sharing economy in Part I. Part I also introduces alternative accommodations companies and Airbnb. Part II presents § 230 of the Communications Decency Act, which protects Airbnb from liability for the actions of its users. Also discussed in Part II are state regulations and their effects on Airbnb hosts. Part III of this Note outlines three alternatives to shift liability for the legality of rental units from hosts to Airbnb and suggests that an approach based on social responsibility and societal pressure is best.

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<sup>8</sup> *Id.*

<sup>9</sup> 47 U.S.C. § 230(c)(1) (2012); *see also infra* Sections II.A-B.

<sup>10</sup> *See infra* Subsection II.C.1.

<sup>11</sup> *See infra* Section III.B.

## I. THE SHARING ECONOMY

The underlying principles of the sharing economy are thought to guide the operations of sharing economy companies. The following sections outline the principles and characteristics of the sharing economy.<sup>12</sup> Further, the following sections describe the practices of alternative accommodations companies within the sharing economy.<sup>13</sup> Lastly, Airbnb is profiled.<sup>14</sup>

### A. Principles and Characteristics of the Sharing Economy

The environment, or community, in which Airbnb and other alternative accommodations companies operate is called the “sharing economy.” The sharing economy has many names, such as “‘the relationship economy,’ the ‘cooperative economy,’ the ‘grassroots economy,’ or just the ‘new economy.’”<sup>15</sup> Operating within the sharing economy is the peer-to-peer economy, of which alternative accommodations companies are a part.<sup>16</sup> The peer-to-peer economy facilitates transactions between consumers without the use of a traditional intermediary party.<sup>17</sup> However, no matter what designation is used to refer to the sharing economy, it is defined by key principles.

Principles of the sharing economy include shared ownership, cooperation, and using assets in ways that are socially or environmentally beneficial.<sup>18</sup> By following these principles, the sharing economy allows individuals to access necessary goods and services without requiring the individual to own a good or purchase a service on their own.<sup>19</sup> As a result, the sharing

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<sup>12</sup> See *infra* Section I.A.

<sup>13</sup> See *infra* Section I.B.

<sup>14</sup> See *infra* Section I.C.

<sup>15</sup> JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES 1 (2012).

<sup>16</sup> ORSI, *supra* note 15, at 5.

<sup>17</sup> *Peer-to-Peer (P2P) Economy*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/peertopeer-p2p-economy.asp> (last visited May 7, 2016).

<sup>18</sup> ORSI, *supra* note 15, at 2, 5.

<sup>19</sup> *Id.* at 2, 4; Molly Cohen & Corey Zehngebot, *What’s Old Becomes New: Regulating the Sharing Economy*, 58 BOS. B.J. 6, 6 (2014).

economy is not solely concerned with sharing. Rather, the sharing economy strives to create a socio-economic environment focused on using labor and resources to their maximum potential.<sup>20</sup>

To facilitate a socio-economic environment focused on sharing goods and services, members of the sharing economy create sharing agreements when conducting transactions.<sup>21</sup> Many laws, however, did not contemplate the development of sharing agreements.<sup>22</sup> Thus, rather than relying on traditional laws to validate sharing agreements, sharing economy companies rely on “reputation systems and monitoring tools” to facilitate successful peer-to-peer transactions.<sup>23</sup> Consequently, sharing economy transactions have exposed many gray areas in the law.<sup>24</sup>

Gray areas in the law that the sharing economy reveal result from the fact that the current legal system assumes that individuals enter transactions due to three mutually exclusive motivations: personal, commercial, and charitable.<sup>25</sup> Transactions in the sharing economy, however, straddle and blur the lines between these three categories.<sup>26</sup> At least one scholar views these legal gray areas as indications that change in the law is required.<sup>27</sup> Despite gray areas in the

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<sup>20</sup> Brhmie Balaram, *How to Defeat Monopoly Power in the Sharing Economy*, SHAREABLE (Feb. 7, 2016), <http://www.shareable.net/blog/how-to-defeat-monopoly-power-in-the-sharing-economy>.

<sup>21</sup> ORSI, *supra* note 15, at 5.

<sup>22</sup> *Id.* at 13 (“Many of our laws developed over the last century to manage economic relationships that were becoming increasingly polarized or exploitative.”). Examples of laws that did not foresee sharing relationships include employer–employee and landlord–tenant laws. “Although the legal gray areas encountered by the sharing economy can be bewildering, the very fact that activities in the sharing economy cannot be put into traditional legal boxes tells us something very powerful and hopeful: these activities are radically different from what we have been doing for the past century. . . . By eluding most traditional legal categories, the sharing economy has shown us that it is, truly, a *new* economy.” *Id.*

<sup>23</sup> Arun Sundararajan, *Why the Government Doesn't Need to Regulate the Sharing Economy*, WIRED (Oct. 22, 2012, 1:45 PM), <http://www.wired.com/2012/10/from-airbnb-to-coursera-why-the-government-shouldnt-regulate-the-sharing-economy/>.

<sup>24</sup> ORSI, *supra* note 15, at 13.

<sup>25</sup> *Id.* at 14.

<sup>26</sup> *Id.*; Cohen & Zehngebot, *supra* note 19, at 6. Sharing economy companies are disruptive innovations, which further challenges the current legal environment. See Brian Sheppard, *Incomplete Innovation and the Premature Disruption of Legal Services*, 2015 MICH. ST. L. REV. 1797, 1809-15.

<sup>27</sup> ORSI, *supra* note 15, at 16 (“Certain employment laws, securities regulations, commercial regulations, and zoning ordinances create incredibly difficult legal barriers, such that we should change them sooner rather than later.”).

law, many sharing economy companies have emerged, and these companies rely on trust and reputation to be successful.<sup>28</sup>

## B. Sharing Economy Companies

Sharing economy transactions are typically mediated by companies operating as Internet platforms. Platforms are entities that facilitate exchange between producers and consumers.<sup>29</sup> The main difference between platforms and traditional producers is that platforms typically do not own their inventory.<sup>30</sup> Internet platforms operating in the sharing economy are numerous and span various service sectors. For example, Uber<sup>31</sup> and Lyft<sup>32</sup> operate in the transportation sector; Kickstarter<sup>33</sup> and Pozible<sup>34</sup> operate in the crowd funding sector; and Rover<sup>35</sup> and Dogvacay<sup>36</sup> provide pet-sitting services. Alternative accommodations companies facilitate “peer-to-peer property rental,” which allows individuals to rent rooms in their home or rent their entire house for short periods.<sup>37</sup> Each operating sector within the sharing economy faces unique challenges with reference to the law;<sup>38</sup> however, this Note focuses on the alternative accommodations sector of the sharing economy, specifically Airbnb.<sup>39</sup>

There are many alternative accommodations companies operating in the sharing economy. For example, HomeAway, Inc. operates three alternative accommodations companies in the

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<sup>28</sup> See Sundararajan, *supra* note 23; see also, e.g., *Trust & Safety*, *supra* note 3.

<sup>29</sup> Sangeet Choudary, *How the Hotel Industry Got Blindsided . . . And Why Yours Could Be Next*, FORBES (July 7, 2014, 11:12 AM), <http://www.forbes.com/sites/grouphink/2014/07/07/how-the-hotel-industry-got-blindsided-and-why-yours-could-be-next/#70403ae1557f>.

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

<sup>31</sup> UBER, <https://www.uber.com/> (last visited May 7, 2016).

<sup>32</sup> LYFT, <https://www.lyft.com/> (last visited May 7, 2016).

<sup>33</sup> KICKSTARTER, <https://www.kickstarter.com/> (last visited May 7, 2016).

<sup>34</sup> POZIBLE, <http://www.pozible.com/> (last visited May 7, 2016).

<sup>35</sup> ROVER, <https://www.rover.com/> (last visited May 7, 2016).

<sup>36</sup> DOGVACAY, <https://dogvacay.com/> (last visited May 7, 2016).

<sup>37</sup> *Peer-to-Peer Property Rental*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Peer-to-peer\\_property\\_rental](https://en.wikipedia.org/wiki/Peer-to-peer_property_rental) (last modified Nov. 3, 2015, 7:27 PM).

<sup>38</sup> See, e.g., Alexi Pfeffer-Gillet, *When “Disruption” Collides with Accountability: Holding Ridesharing Companies Liable for Acts of Their Drivers*, 104 CALIF. L. REV. 223 (2016).

<sup>39</sup> See *infra* Section I.C.

United States as well as companies scattered throughout the world.<sup>40</sup> Like other alternative accommodations companies, HomeAway facilitates rental contracts between hosts and guests,<sup>41</sup> and the company is not a party to these contracts.<sup>42</sup> Another alternative accommodations company operating within the sharing economy is Onefinestay, which operates in 130 countries.<sup>43</sup> Onefinestay operates more like a hotel than other companies. For example, Onefinestay's services include the use of local teams to clean the rentals and to greet guests upon arrival.<sup>44</sup> Other alternative accommodations include FlipKey, which is operated by TripAdvisor,<sup>45</sup> and Couchsurfing.<sup>46</sup> The most notable alternative accommodations company—and, for that reason, the focus of this Note—is Airbnb.<sup>47</sup>

### C. Airbnb

Airbnb advertises itself as “a trusted community marketplace for people to list, discover, and book unique accommodations around the world.”<sup>48</sup> Further, Airbnb operates in a way that allows users to benefit from the use of extra space in their residence.<sup>49</sup> To facilitate the trust it boasts, Airbnb has adopted a number of policies and a peer-review system that form the basis of

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<sup>40</sup> *Company Information*, HOMEAWAY, <https://www.homeaway.com/info/about-us/company-info> (last visited May 7, 2016). HomeAway, Inc. operates “HomeAway.com, VRBO.com and VacationRentals.com in the United States; HomeAway.co.uk and OwnersDirect.co.uk in the United Kingdom; HomeAway.de in Germany; Abritel.fr and Homelidays.com in France; HomeAway.es and Toprural.es in Spain; AlugueTemporada.com.br in Brazil; HomeAway.com.au and Stayz.com.au in Australia; and Bookabach.co.nz in New Zealand. Asia Pacific short-term rental site, travelmob.com, is also owned by HomeAway.” *Id.*

<sup>41</sup> *How It Works. Explore. Book. Travel*, HOMEAWAY, [https://www.homeaway.com/info/homeaway/owner-marketing/how-it-works?icid=IL\\_support\\_BR\\_T\\_Text\\_howitworks\\_LOTH\\_howitworks](https://www.homeaway.com/info/homeaway/owner-marketing/how-it-works?icid=IL_support_BR_T_Text_howitworks_LOTH_howitworks) (last visited May 7, 2016).

<sup>42</sup> *Terms and Conditions*, HOMEAWAY, <https://www.homeaway.com/info/about-us/legal/terms-conditions> (last updated Sept. 15, 2015).

<sup>43</sup> ONEFINESTAY, <http://www.onefinestay.com/> (last visited May 7, 2016).

<sup>44</sup> *Our Service*, ONEFINESTAY, <http://www.onefinestay.com/service/> (last visited May 7, 2016).

<sup>45</sup> FLIPKEY, <https://www.flipkey.com/> (last visited May 7, 2016).

<sup>46</sup> COUCHSURFING, <https://www.couchsurfing.com/> (last visited May 7, 2016).

<sup>47</sup> AIRBNB, <https://www.airbnb.com/> (last visited May 7, 2016); Andrew Coutts, *Terms & Conditions: Airbnb Makes Everything Your Problem*, DIGITAL TRENDS (Nov. 4, 2012), <http://www.digitaltrends.com/web/terms-conditions-airbnb/> (noting that Airbnb has become increasingly controversial).

<sup>48</sup> *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited May 7, 2016).

<sup>49</sup> See *infra* Subsection II.C.1.

Airbnb's sharing agreements.<sup>50</sup> These policies however, have drawn negative attention from social organizations and government officials.<sup>51</sup>

### 1. *Airbnb Operations*

Airbnb is an alternative accommodations company that was founded in San Francisco, California, in August 2008.<sup>52</sup> The company, which currently advertises over 2 million listings, has facilitated rentals for more than 60 million guests in over 34,000 cities in 190 countries.<sup>53</sup> Airbnb boasts that it provides an easy and efficient way for individuals to monetize their space.<sup>54</sup> Accordingly, Airbnb provides hosts with a way to make their own housing more affordable.<sup>55</sup>

Airbnb's proclaimed ease of use extends to the process of becoming an Airbnb host. To become an Airbnb host, first, a prospective host provides their home type, room type, the number of people the rental will accommodate, and the city.<sup>56</sup> Next, the individual provides personal information, which includes name, email, and birthday.<sup>57</sup> Finally, the prospective host clicks the "Sign up" button, which also signifies "agree[ment] to Airbnb's Terms of Service, Privacy Policy, Guest Refund Policy, and Host Guarantee Terms."<sup>58</sup> In these simple steps an individual becomes signed up to be an Airbnb host; however, listing the first rental requires an additional seven steps.<sup>59</sup> These steps include providing basic information about the rental; giving a short description of the rental, its location, and amenities; uploading at least one photo of the listing;

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<sup>50</sup> See *infra* Subsection II.C.2.

<sup>51</sup> See *infra* Subsection II.C.2.

<sup>52</sup> *About Us*, *supra* note 48.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Kaplan & Nadler, *supra* note 5, at 107.

<sup>56</sup> *List Your Space*, AIRBNB, <https://www.airbnb.com/rooms/new> (last visited May 7, 2016).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> The listing information is connected with an individual account, which requires a password. Therefore a citation would be ineffective.

completing a home safety checklist, including emergency instructions to leave at the rental; and providing pricing and availability information.<sup>60</sup>

Airbnb facilitates rentals of two main types of units. The first type of Airbnb unit is the “host-present” rental, which typically involves a host renting out a private room within their residence.<sup>61</sup> The second type of Airbnb unit is the “host-absent” rental.<sup>62</sup> A host-absent rental occurs when an Airbnb host rents out their entire residence.<sup>63</sup> Although host-absent rentals are often the subject of Airbnb horror stories,<sup>64</sup> both host-absent and host-present Airbnb units result in unanticipated issues for hosts.<sup>65</sup>

## 2. *How Airbnb Gains Users’ Trust*

To combat any uneasiness that hosts or guests may have, Airbnb strives to establish a relationship of trust between hosts, guests, and itself. Some ways in which Airbnb attempts to establish mutual trust is through an identification verification system,<sup>66</sup> two-way review system, and a 24/7 help center.<sup>67</sup> Airbnb has also adopted a Guest Refund Policy, which allows guests to receive a refund if a “Travel Issue” occurs,<sup>68</sup> and a \$1 million Host Guarantee, which acts as

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<sup>60</sup> See *supra* note 59.

<sup>61</sup> THE AIRBNB ANALYST, <http://the-airbnb-analyst.com/> (last visited May 7, 2016).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*; see, e.g., *Horror Stories*, *supra* note 4.

<sup>65</sup> *Airbnb “Entire Place” Rentals Are the Source of Most Airbnb Horror Stories*, THE AIRBNB ANALYST, <http://the-airbnb-analyst.com/airbnb-entire-place-rentals-source-horror-stories/> (last visited May 7, 2016); see *infra* Subsection II.C.1.

<sup>66</sup> The only identification Airbnb requires for verification is the Airbnb user’s email address. The Airbnb user may choose to provide more information.

<sup>67</sup> *Trust & Safety*, *supra* note 3; see also *Help Center*, AIRBNB, <https://www.airbnb.com/help> (last visited May 7, 2016).

<sup>68</sup> *Guest Refund Policy Terms*, AIRBNB, [https://www.airbnb.com/terms/guest\\_refund\\_policy](https://www.airbnb.com/terms/guest_refund_policy) (last visited May 7, 2016). Travel Issues outlined in the Guest Refund Policy include instances in which the host cancels a reservation or does not provide the guest with access to the reservation or the accommodation does not match its description. *Id.*

insurance for specific types of property damage to rentals.<sup>69</sup> Further, in an attempt to increase the safety of Airbnb rentals, the company posts hosting etiquette and rental safety tips for its hosts.<sup>70</sup>

Although Airbnb's attempts to develop trust between hosts, guests, and itself, Airbnb disclaims itself from liability for the actions of its hosts.<sup>71</sup> One instance of this disclaimer appears as a footnote on Airbnb's "Responsible Hosting" webpage, and it states, "Please note that Airbnb has no control over the conduct of Hosts and disclaims all liability. Failure of Hosts to satisfy their responsibilities may result in suspension of activity or removal from the Airbnb website."<sup>72</sup> Another, instance of Airbnb's disclaimer of responsibility for hosts appears in the Terms of Service, to which hosts agree when they complete the process of becoming a host.<sup>73</sup> Airbnb's Terms of Service state the following:

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 obtain a license before listing a property or accepting guests. Certain types of short-term bookings may be prohibited altogether. Local governments vary greatly in how they enforce these laws. Penalties may include fines or other enforcement. Hosts should review local laws before listing a space on Airbnb.<sup>74</sup>

In an effort to prompt hosts to learn local regulations, Airbnb posts a list of housing regulations and zoning ordinances for forty-eight cities within the United States on a separate page of its website.<sup>75</sup>

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<sup>69</sup> *The \$1,000,000 Host Guarantee*, AIRBNB, <https://www.airbnb.com/guarantee> (last visited May 7, 2016). The guarantee does not cover "cash and securities, pets, personal liability, [and] shared or common areas." *Id.*

<sup>70</sup> *Responsible Hosting*, AIRBNB, <https://www.airbnb.com/help/responsible-hosting> (last visited May 7, 2016); *Home Safety*, AIRBNB, <https://www.airbnb.com/home-safety> (last visited May 7, 2016).

<sup>71</sup> *Responsible Hosting*, *supra* note 70.

<sup>72</sup> *Id.*

<sup>73</sup> *Terms of Service*, *supra* note 7; *List Your Space*, AIRBNB, <https://www.airbnb.com/rooms/new> (last visited May 7, 2016).

<sup>74</sup> *Terms of Service*, *supra* note 7. Recently, Airbnb has added an additional item to its Terms of Service, which designates Airbnb hosts as independent, third party contractors. *Id.* Whether Airbnb hosts truly are independent contractors is not analyzed in this Note as it is not critical to the discussion.

<sup>75</sup> *Responsible Hosting*, *supra* note 70.

As a result of Airbnb's efforts to remove itself from liability for the actions of its hosts, opposition to Airbnb has become common.<sup>76</sup> For example, Share Better is an association whose mission is to expose the negative effects of Airbnb on society.<sup>77</sup> Elected officials and other organizations support Share Better.<sup>78</sup> Further some government officials have also lobbied to increase regulations on Airbnb. An example of lobbying against Airbnb's disclaimer of liability is the failed California Senate Bill 593, which proposed that Airbnb, as an Internet platform, should bear the burden of ensuring that its listings comply with state and local housing regulations.<sup>79</sup>

Despite some opposition to Airbnb's practices, the Internet platform continued to distance itself from liability for the legality of its listings. As Part II will illustrate, Airbnb is able to avoid liability for hosts' violations of state and local regulations as a result of § 230 of the Communications Decency Act and courts' interpretations of the statute.<sup>80</sup> As a result, states' attempts to place more liability on the Internet platform have not yet been successful.<sup>81</sup>

## II. REGULATION OF AIRBNB

Companies operating within the sharing economy generally task users with navigating the laws that govern the transactions into which they enter.<sup>82</sup> Airbnb hosts are included within the population of users who must determine for themselves the risk of operating within the

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<sup>76</sup> Couts, *supra* note 47 ("Airbnb has become increasingly controversial over the past couple years due to the fact that home or apartment renters are probably violating the terms of their lease by effectively 're-renting' out their space on Airbnb—technically known as subletting. If you choose to ignore the terms of your lease, that's your problem—Airbnb absolves itself of all responsibility. Just don't be surprised if your landlord serves you with an eviction notice.").

<sup>77</sup> SHARE BETTER, <http://www.sharebetter.org/> (last visited May 7, 2016).

<sup>78</sup> *Id.*

<sup>79</sup> *See infra* Subsection II.C.2.b.

<sup>80</sup> *See infra* Sections II.A-B.

<sup>81</sup> *See infra* Subsection II.C.2.b.

<sup>82</sup> Bryant Cannon & Hanna Chung, *A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies*, 31 SANTA CLARA HIGH TECH. L.J. 23, 53 (2015).

sharing economy.<sup>83</sup> The main reasons Airbnb can charge hosts with this task are its Terms of Service<sup>84</sup> and § 230 of the Federal Communications Decency Act, which is interpreted to grant Internet platforms protection from liability for the actions of their users.<sup>85</sup> As a result, Airbnb hosts become the targets of local regulations, which may result in fines, legal action, and eviction.<sup>86</sup> Further, states have been unsuccessful in their attempts to increase Airbnb’s liability for the legality of its rentals.<sup>87</sup>

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

Section 230 of the Federal Communications Decency Act protects Airbnb and other Internet platforms operating in the sharing economy from liability for users’ actions.<sup>88</sup> Congress enacted the statute in response to a case in which a New York state court held a company liable as a publisher for the content of all posts to its message board because the company previously deleted defamatory posts from the message board.<sup>89</sup> The intention behind the statute was to motivate Internet platforms to establish “proactive screening measures”<sup>90</sup> by eliminating the negative risks of monitoring.<sup>91</sup> Since its enactment in 1996, the text of § 230 has not changed, despite the constant evolution of the Internet.<sup>92</sup>

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<sup>83</sup> *Terms of Service*, *supra* note 7.

<sup>84</sup> *See id.*

<sup>85</sup> 47 U.S.C. § 230(c)(1) (2012). The Communications Decency Act is the common designation for Title V of the Telecommunications Act of 1996.

<sup>86</sup> *See infra* Section II.C.

<sup>87</sup> *See infra* Subsection II.C.2.b.

<sup>88</sup> § 230.

<sup>89</sup> *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, at \*4 (N.Y. Sup. Ct. May 24, 1995).

<sup>90</sup> Stephen Collins, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 NW. U. L. REV. 1471, 1499 (2008); *see also* *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (stating that Congress’s intent was to promote self-regulation of service providers).

<sup>91</sup> Matthew Feuerman, *Court-Side Seats? The Communications Decency Act and the Potential Threat to Stubhub and Peer-to-Peer Marketplaces*, 57 B.C. L. REV. 227, at 233 (2016); Ryan Gerdes, *Scaling Back S 230 Immunity: Why the Communications Decency Act Should Take a Page from the Digital Millennium Copyright Act’s Service Provider Immunity Playbook*, 60 DRAKE L. REV. 653, 675 (2012).

<sup>92</sup> Brittany McNamara, Note, *Airbnb: A Not-So-Safe Resting Place*, 13 COLO. TECH. L.J. 149, 161 (2015). *Compare* § 230(c)(1), *with* Pub. L. No. 104-104 § 509, 110 Stat. 56, 137 (May 7, 1996).

The pertinent language of § 230 that protects Internet platforms from liability for actions of their users 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.”<sup>93</sup> Section 230 does not prevent states from enforcing laws consistent with it; however, Section 230 disallows causes of action that would impose liability under state or local laws that are inconsistent with § 230.<sup>94</sup> This means that an Internet platform is immune from liability for the actions and posts of its users as long as the platform is not found to be an information content provider for that action or post.<sup>95</sup>

To determine whether an Internet platform is liable for the actions of its users, a court must determine whether the platform, an interactive computer service provider, is also an information content provider.<sup>96</sup> Information content providers are “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>97</sup> Section 230, however, does not explain

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<sup>93</sup> § 230(c)(1). Section 230 defines interactive computer service as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” *Id.* § 230(f)(2). The term information in the statute is interpreted broadly:

Congress could have written something like: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any sexually oriented material provided by another information content provider.” That is not, however, what it enacted. Where the phrase “sexually oriented material” appears in our rephrasing, the actual statute has the word “information.” That covers ads for housing, auctions of paintings that may have been stolen by Nazis, biting comments about steroids in baseball, efforts to verify the truth of politicians’ promises, and everything else that third parties may post on a web site; “information” is the stock in trade of online service providers.

Chicago Lawyers’ Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008), as amended (May 2, 2008).

<sup>94</sup> § 230(e)(3).

<sup>95</sup> *Id.* § 230(c)(1).

<sup>96</sup> *Id.* § 230.

<sup>97</sup> *Id.* § 230(f)(3).

what “treated as the publisher or speaker” means, which prompts courts to determine the meaning of the statute.<sup>98</sup>

## B. Interpreting and Applying § 230

Courts have interpreted § 230 to immunize interactive computer services from liability for maintaining editorial control over users’ posts.<sup>99</sup> As the following sections illustrate, an interactive computer service provider loses its § 230 protection only if it materially contributes to illegal information on its website.<sup>100</sup> Moreover, § 230 will more than likely bar claims against interactive computer service providers based on “passive acquiescence” in users’ illegal activity.<sup>101</sup>

### 1. Notice Is Not Enough

In 1997, in *Zeran v. America Online, Inc.*, Zeran brought suit against America Online after America Online did not remove harmful bulletin board postings upon receiving notice of the postings.<sup>102</sup> Zeran argued that America Online failed to remove the posts in an adequate time frame and failed to monitor for similarly harmful posts after receiving the initial notice.<sup>103</sup> The Fourth Circuit affirmed the district court’s grant of judgment in favor of America Online based on the fact that § 230 immunized the interactive computer service provider from Zeran’s claims.<sup>104</sup>

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<sup>98</sup> Nancy S. Kim, *Website Design and Liability*, 52 JURIMETRICS J. 383, 390-91 (2012); see, e.g., *Craigslist*, 519 F.3d at 670 (discussing possible interpretations of § 230).

<sup>99</sup> *Fair Hous. Council of San Fernando v. Roommates.com*, 521 F.3d 1157, 1163 (9th Cir. 2008) (interpreting § 230 to mean that interactive service providers are immune if they delete users’ information, but not if they create it).

<sup>100</sup> *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009) (citing *Roommates.com*, 521 F.3d at 1167-68).

<sup>101</sup> *Roommates.com*, 521 F.3d at 1169 n.24.

<sup>102</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997). An unidentified user created the posts on AOL’s bulletin board, and the postings linked Zeran to paraphernalia boasting offensive sayings about the Oklahoma City bombing. *Id.*

<sup>103</sup> *Id.* at 328.

<sup>104</sup> *Id.* at 329.

Prior to reaching its conclusion, the Fourth Circuit rejected the argument that interactive computer services are liable under § 230 based on notice.<sup>105</sup> In its reasoning, the court noted that notice-based liability would disincentivize monitoring because, if service providers learn of illegal postings, the likelihood of a court finding them liable under § 230 would increase.<sup>106</sup> The court also noted that notice-based liability would present providers with the impossible task of screening millions of postings.<sup>107</sup> Lastly, the court hypothesized that notice-based liability would decrease interactive computer services' self-regulation.<sup>108</sup> The Fourth Circuit's holding has been widely followed, with only a few exceptions.<sup>109</sup>

## *2. The Platform Must at Least Be Partially Responsible for the Illegality*

In *Fair Housing Council of San Fernando v. Roommates.com*, the Housing Council brought suit against Roommates.com—a website that matches individuals with open rooms with individuals looking for a place to stay—for alleged violations of the Fair Housing Act and state housing discrimination laws.<sup>110</sup> The Housing Council alleged that Roommates.com's website required users to answer questions about gender, sexual orientation, and children, and claimed that the website acted as a “housing broker doing online what it may not lawfully do off-line.”<sup>111</sup>

With regard to the Housing Council's claims, the Ninth Circuit held that Roommates.com was not immune from liability under § 230 because the website prompted users to express illegal

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<sup>105</sup> *Id.* at 333.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 332 (“It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.”).

<sup>108</sup> *Id.* at 333.

<sup>109</sup> Collins, *supra* note 90, at 1483 n.99.

<sup>110</sup> Fair Hous. Council of San Fernando v. Roommates.com, 521 F.3d 1157, 1161-62 (9th Cir. 2008).

<sup>111</sup> *Id.* at 1161-62.

preferences.<sup>112</sup> The court reasoned that Roommates.com was at least partially responsible for discriminatory information appearing in users' profiles because both Roommates.com and the user played a role in constructing the profiles.<sup>113</sup> Therefore, the court concluded that Roommates.com acted as more than "a framework that could be utilized for proper or improper purposes," which removed the interactive computer service from the scope of § 230's immunity.<sup>114</sup>

### 3. *Screening Is a Burden on Internet Platforms*

In the case of *Chicago Lawyers' Committee for Civil Rights Under the Law v. Craigslist*, the Lawyers' Committee claimed that Craigslist violated the Fair Housing Act when it published discriminatory housing posts on its website.<sup>115</sup> Interpreting § 230, the Seventh Circuit affirmed the district court's decision to grant judgment in favor of Craigslist.<sup>116</sup>

The Seventh Circuit's reasoning both mentioned the difficulty of monitoring as well as critiqued § 230's effect on interactive computer services. The court noted that under § 230, "screening, though lawful, is hard."<sup>117</sup> Further, the court described the difficulty that Craigslist would face if it were to implement a screening process, stating:

An online service could hire a staff to vet the postings, but that would be expensive and may well be futile: if postings had to be reviewed before being put online, long delay could make the service much less useful, and if the vetting came only after the material was online the buyers and sellers might already have made their deals. Every month more than 30 million notices are posted to the craigslist system. Fewer than 30 people, all based in California, operate the system, which offers classifieds and forums for 450 cities. It

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<sup>112</sup> *Id.* at 1165 ("The CDA does not grant immunity for inducing third parties to express illegal preferences.").

<sup>113</sup> *Id.* at 1167. "By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information." *Id.* at 1166.

<sup>114</sup> *Id.* at 1172 ("Roommate both elicits the allegedly illegal content and makes aggressive use of it in conducting its business . . . Roommate's work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism is directly related to the alleged illegality of the site.").

<sup>115</sup> 519 F.3d 666, 668 (7th Cir. 2008).

<sup>116</sup> *Id.* at 672 ("[G]iven § 230(c)(1) [the Lawyers' Committee] cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination.").

<sup>117</sup> *Id.* at 668.

would be necessary to increase that staff (and the expense that users must bear) substantially to conduct the sort of editorial review that the Lawyers' Committee demands—and even then errors would be frequent.<sup>118</sup>

However, the court went on to state that § 230 did not intend for interactive computer services to “take the do-nothing option and enjoy immunity” from liability for all information published on their website.<sup>119</sup>

In addition to the outlined cases, courts have held that interactive computer service providers are protected from liability under § 230 for actions of their users ranging from housing violations<sup>120</sup> to defamation<sup>121</sup> to sexual acts with minors.<sup>122</sup> Courts' interpretations and applications of § 230 have allowed interactive computer service providers, such as Internet platforms in the sharing economy, to operate with some certainty that a court will not hold them liable for the actions of users.<sup>123</sup> However, § 230 does not protect Internet platforms' users from liability, which leaves users at risk of violating state and local regulations.<sup>124</sup>

### C. State Regulation

Due to § 230 of the Communications Decency Act, Airbnb, as an Internet platform, is generally not liable for actions of its users.<sup>125</sup> Therefore, state and local governments are not able to directly regulate Airbnb rentals' violations at the platform level.<sup>126</sup> This leads state and local agencies to hold Airbnb users, specifically hosts, liable for illegal activity.<sup>127</sup> The state and local

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<sup>118</sup> *Id.* at 668-69.

<sup>119</sup> *Id.* at 670 (“§ 230(c)—which is, recall, part of the ‘Communications Decency Act’—bears the title ‘Protection for “Good Samaritan” blocking and screening of offensive material’, hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services.”).

<sup>120</sup> *See, e.g.*, Fair Hous. Council of San Fernando v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008).

<sup>121</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997).

<sup>122</sup> *See, e.g.*, Saponaro v. Grindr, LLC, 93 F. Supp. 3d 319. In *Saponaro*, the court held Grindr immune from liability for Saponaro's claims that Grindr negligently failed to enforce the age-restriction in its Terms of Service because Grindr merely provides its users with tools that may be used to conduct unlawful conduct. *Id.* at 322, 324.

<sup>123</sup> *McNamara, supra* note 92, at 149.

<sup>124</sup> *Id.*

<sup>125</sup> *See* 47 U.S.C. § 230 (2012); *see also supra* Section II.A.

<sup>126</sup> *McNamara, supra* note 92, at 161.

<sup>127</sup> *Id.*

regulations affecting Airbnb hosts vary widely. Regulations may enforce a maximum number of nights for rentals, require a host to register him or herself as a host or obtain a rental permit or license,<sup>128</sup> or they may be prohibitively burdensome on hosts.<sup>129</sup> In addition to state laws, Airbnb hosts may be subject to homeowners association and deed restrictions, as well as the terms of their lease.<sup>130</sup>

Airbnb encourages its hosts to educate themselves about the zoning and administrative codes in their city prior to listing their space,<sup>131</sup> and the company disclaims liability for hosts' violations of state and local regulations.<sup>132</sup> Accordingly, Airbnb hosts must locate, comprehend, and abide by state and local regulations.<sup>133</sup> Not surprisingly, Airbnb hosts have encountered unanticipated fines, evictions, and legal action due to the varying restrictions on Airbnb rentals.<sup>134</sup>

State regulations affecting Airbnb hosts range from strict to more lenient. New York and California have both attempted to regulate Airbnb, with differing results. New York adheres to a strict policy that has resulted in the development of a wealth of case law involving Airbnb hosts.<sup>135</sup> Contrastingly, California has attempted to develop regulations that embrace alternative accommodations in the sharing economy.<sup>136</sup>

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<sup>128</sup> *E.g.*, S.F. ADMIN. CODE § 41A.5(g) (2015).

<sup>129</sup> *E.g.*, SANTA MONICA MUN. CODE § 6.20.020 (2015).

<sup>130</sup> *E.g.*, *Gold Street Properties v. Freeman*, N.Y. L.J., July 2, 2014 (N.Y. Civ. Ct. June 16, 2014) (lease provision); *In re David Fruchter v. Zoning Bd. of Appeals*, 133 A.D.3d 1174 (N.Y. App. Div. 2015) (zoning restriction).

<sup>131</sup> *What Legal and Regulatory Issues Should I Consider Before Hosting on Airbnb?*, AIRBNB, <https://www.airbnb.com/help/article/376/what-legal-and-regulatory-issues-should-i-consider-before-hosting-on-airbnb> (last visited May 7, 2016).

<sup>132</sup> *See supra* note 74 and accompanying text.

<sup>133</sup> *Terms of Service*, *supra* note 7.

<sup>134</sup> *See infra* Subsection II.C.1.

<sup>135</sup> *See infra* Subsection II.C.1.

<sup>136</sup> *See infra* Subsection II.C.2.

## 1. *New York*

In the state of New York, the Multiple Dwelling Law prohibits occupants from renting their residence for fewer than thirty consecutive days.<sup>137</sup> The Multiple Dwelling Law applies this restriction to “class A” multiple dwellings, which are “rented, leased, let or hired out, to be occupied . . . as the residence or home of three or more families living independently of each other . . . [and] is occupied for permanent residence purposes.”<sup>138</sup> The law goes on to explicitly prohibit individuals who are considered “house guests or lawful boarders, roomers or lodgers” from occupying a class A multiple dwelling for fewer than thirty consecutive days.<sup>139</sup>

The New York Senate recently introduced a bill that would make the tenant of a class A multiple dwelling directly responsible for any violations of the Multiple Dwelling Law.<sup>140</sup> The bill targets short-term rental units that are facilitated through “Internet based residential websites,” such as Airbnb.<sup>141</sup> Further, the bill proposes that owners and landlords of class A multiple dwellings are not liable for violations of the Multiple Dwelling Law, unless they have continued to allow the occupant to operate a short-term rental unit after acquiring knowledge of the violation.<sup>142</sup> New York’s laws have resulted in a growing area of case law involving alternative accommodations hosts.

### a. Non-Rent-Regulated Class A Multiple Dwellings

In *Gold Street Properties v. Freeman*, a property management company of an apartment that is not subject to rent regulations sought to evict the tenant for operating an Airbnb unit in her

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<sup>137</sup> N.Y. MULT. DWELL. § 4.7-.8 (McKinney 2011).

<sup>138</sup> *Id.* (“For the purposes of this definition, ‘permanent residence purposes’ shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit.”).

<sup>139</sup> *Id.* § 4.8(1)(A).

<sup>140</sup> S.B. 7053, 238th Sess. (N.Y. 2016).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

residence.<sup>143</sup> The lease agreement between the tenant and the management company specifically prohibited subleasing without consent and commercial activities.<sup>144</sup> The court, however, held that the management company was not entitled to regain possession of the residence because the tenant could cure the default.<sup>145</sup> Accordingly, the rental income the tenant received from acting as an Airbnb host did not result in eviction, but it did generate legal action.

#### b. Rent-Regulated Class A Multiple Dwellings

Residences in New York may also be subject to the Rent Stabilization Code in addition to the Multiple Dwelling Law. The Rent Stabilization Code prohibits individuals from receiving rent for accommodations in an amount that is greater than the legal regulated rent, “or otherwise to do or omit to do any act, in violation of any . . . requirement” of the Rent Stabilization Code.<sup>146</sup> Under the rent stabilization law, tenants may sublease their residence so long as the tenant does not charge rent in excess of the legal regulated rent.<sup>147</sup> As demonstrated in *Brookford, LLC v. Penraat*,<sup>148</sup> if a tenant violates this provision, the landlord may terminate the tenancy without providing the tenant an opportunity to cure the violation.<sup>149</sup>

In *Brookford, LLC v. Penraat*, the tenant of a rent-controlled, class A multiple dwelling used Airbnb to host 135 guests for periods ranging from three to twenty-one nights.<sup>150</sup> The landlord of the dwelling issued the tenant a Notice of Termination of her tenancy for the tenant’s

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<sup>143</sup> N.Y. L.J., July 2, 2014, at 1 (N.Y. Civ. Ct. June 16, 2014).

<sup>144</sup> *Id.* at 2.

<sup>145</sup> *Id.* at 5-6.

<sup>146</sup> N.Y. RENT STABILIZATION CODE § 2525.1 (McKinney Unconsol. 2015).

<sup>147</sup> *Id.* § 2525.6(a)-(b).

<sup>148</sup> 8 N.Y.S.3d 859 (N.Y. Sup. Ct. 2014); *see also* 335-7 LLC v. Steele, 993 N.Y.S.2d 646 (Table) (N.Y. App. Term 2014) (holding that the landlord was not required to serve a notice to cure when the tenant violated the Rent Stabilization Code while acting as an Airbnb host); 51 W. 86th St. Assoc. LLC v. Fontana, 960 N.Y.S.2d 341 (N.Y. App. Term 2010); 220 W. 93rd St., LLC v. Stavrolakes, 823 N.Y.S.2d 44 (N.Y. App. Div. 2006).

<sup>149</sup> N.Y. RENT STABILIZATION CODE § 2524.3(h).

<sup>150</sup> *Brookford, LLC*, 8 N.Y.S.3d at 860.

violations of both the Multiple Dwelling Law and the Rent Stabilization Code.<sup>151</sup> The court held that the tenant's actions were in violation of the law, and the landlord was not required to serve the tenant with a notice to cure prior to the notice of termination.<sup>152</sup>

### c. Single-Family Residences

*In re David Fruchter v. Zoning Board of Appeals of the Town of Hurley* demonstrates the difference in treatment between class A multiple dwellings and one-family dwellings in New York. In this case, Fruchter used the sharing economy to rent his single-family residence for stays ranging from one night to an entire season.<sup>153</sup> The Zoning Board issued Fruchter with an order to cease operating an illegal bed-and-breakfast or hotel without a permit.<sup>154</sup> The court determined that Fruchter's use of the property was not a violation of the zoning regulations because the residence did not have "a common exterior entrance or entrances," and it was not an "'owner-occupied dwelling' in which only 'rooms' were being rented."<sup>155</sup> Although Fruchter avoided liability for hosting alternative accommodations using the sharing economy, he did not escape unanticipated legal action.

## 2. California

In contrast to regulations in New York, regulations in California attempt to regulate sharing economy alternative accommodations in a more accepting way. At both the state- and city-level, California has attempted to adopt regulations that address the legal implications of

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<sup>151</sup> *Id.* at 862. Penraat's actual rent was \$4,477.47; however, as a result of operating Airbnb rentals, Penraat received rental income of more than \$6,500.00 per month on average. *Id.* at 867-68.

<sup>152</sup> *Id.* at 872-73; *see also* 42nd & 10th Associates LLC v. Ikezi, 50 Misc. 3d 130(A) (N.Y. App. Term 2015) (holding that the landlord was not required to serve a notice to cure when the tenant received income from hosting on Airbnb in excess of his monthly rent on his rent stabilized apartment).

<sup>153</sup> 133 A.D.3d 1174, 1174 (N.Y. App. Div. 2015).

<sup>154</sup> *Id.* at 1174-75.

<sup>155</sup> *Id.* at 1176.

Internet platforms and alternative accommodations more clearly.<sup>156</sup> However, California has not yet placed full responsibility for ensuring the legality of alternative accommodations on the Internet platform.<sup>157</sup>

#### a. City-Specific Regulation

San Francisco, the birthplace of Airbnb, adopted a provision in its administrative code that allows permanent residents to conduct legal short-term rentals of their primary residence, with restrictions on the number of days in a year that the residence may be rented.<sup>158</sup> The San Francisco Administrative Code states that a permanent resident may rent their unit as long as the permanent resident occupies the unit for at least 275 days out of the year.<sup>159</sup> Prior to renting their unit, a permanent resident must register the unit through San Francisco's Short-Term Residential Rental Registry.<sup>160</sup> Registered renters must comply with applicable rent control and housing code provisions to maintain legal status.<sup>161</sup>

The city of San Francisco adopted short-term rental provisions in its administrative code to avoid the issue of hosts of alternative accommodations violating local laws.<sup>162</sup> Landlords, however, may still prohibit tenants from operating short-term rentals, despite the provisions of the city's administrative code.<sup>163</sup> Further, the administrative code places responsibility for compliance with the law on hosts of alternative accommodations, rather than the platform

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<sup>156</sup> See *infra* Subsection II.C.2.

<sup>157</sup> See *infra* Subsection II.C.2.b.

<sup>158</sup> S.F. ADMIN. CODE § 41A.5(g) (2015). "Before the Ordinance, the City's municipal code had long prohibited the rental of residential housing units for less than thirty days." *HomeAway Inc. v. City & Cty. of S.F.*, No. 14-cv-04859-JCS, 2015 WL 367121, at \*1 (N.D. Cal. Jan. 27, 2015).

<sup>159</sup> S.F. ADMIN. CODE § 41A.5(g)(1)(A).

<sup>160</sup> *Id.* § 41A.5(g)(1)(E); *Office of Short-Term Rental Registry & FAQs*, CITY & COUNTY OF S.F. PLAN. DEP'T, <http://sf-planning.org/office-short-term-rental-registry-faqs#q01> (last visited May 7, 2016).

<sup>161</sup> S.F. ADMIN. CODE § 41A.5(g)(1)(G)-(H).

<sup>162</sup> Cannon & Chung, *supra* note 82, at 50.

<sup>163</sup> *Id.*

facilitating the transactions.<sup>164</sup> Nevertheless, scholars gravitate toward San Francisco’s approach to regulating alternative accommodations because it provides hosts with flexibility, provides municipalities with information that can be used for enforcement purposes, and it may generate more short-term renting.<sup>165</sup>

#### b. State-Level Regulation

At the state level, California lawmakers have had varied success passing laws to regulate alternative accommodations companies. California lawmakers attempted to address Internet platform liability for alternative accommodations through California State Senate Bill 593.<sup>166</sup> The bill would prohibit alternative accommodations platforms from allowing rental units to operate if the rental violates local laws.<sup>167</sup> The bill would place the liability for “knowing” violations of local laws on the platform.<sup>168</sup> Additionally, platforms would be required to make

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<sup>164</sup> *Id.*

<sup>165</sup> See, e.g., Gregory E. Lines, Note, *Hej, Not Hej Dâ: Regulating Airbnb in the New Age of Arizona Vacation Rentals*, 57 ARIZ. L. REV. 1163, 1182 (2015); Dana Palombo, *A Tale of Two Cities: The Regulatory Battle to Incorporate Short-Term Residential Rentals into Modern Law*, 4 AM. U. BUS. L. REV. 287, 291 (2015).

San Francisco’s accepting approach, however, is not the only approach California cities have taken to regulate alternative accommodations. For example, a Santa Monica ordinance is described as “one of the most restrictive ordinances on home-sharing in the country.” Bill Donovan, Patricia Eberwine & Joe Woodring, *Here to Stay: Legal Challenges in the Home-Sharing Sector of the Sharing Economy*, INSIDE COUNSEL (Oct. 13, 2015), <http://www.insidecounsel.com/2015/10/13/here-to-stay-legal-challenges-in-the-home-sharing>. Under this ordinance, a homeowner must stay at the home with the visitor, become licensed, and pay a 14% occupancy tax if the homeowner wants to rent a room in their home. SANTA MONICA MUN. CODE § 6.20.020 (2015).

Additionally, despite little locatable case law about disputes involving short-term rental hosts, in Los Angeles a landlord was granted summary judgment against a tenant who acted as an Airbnb host. *Chen v. Kraft*, 197 Cal. Rptr. 3d 453 (Cal. App. Dep’t Super. Ct. 2016). The tenant was operating an Airbnb rental in violation of both their agreement with the landlord and the Los Angeles Municipal Code. *Id.*

<sup>166</sup> S.B. 2015-593, Reg. Sess. (Cal. 2015). During a committee hearing on California Senate Bill 593, the committee noted that “[c]ities impose varying restrictions on short-term rentals, from prohibition to no restriction at all. When a city prohibits short-term rentals, it is easy to identify violators on the hosting platform. The most effective way to enforce the prohibition would be for the platform to bar the listing.” CAL. S. COMM. ON TRANSP. & HOUS. REP., S. 2015-593, Reg. Sess. (Apr. 16, 2015). The committee further noted that requiring Internet platforms to identify violators can be an effective means of enforcement due to a prior instance of telephone companies successfully monitoring moving companies adherence to local regulations. *Id.* (“There is precedent for using an intermediary to enforce the law: The California Public Utilities Commission can require telephone companies to disconnect service from moving companies who violate their regulations.”).

<sup>167</sup> S.B. 2015-593, Reg. Sess., at 1.

<sup>168</sup> *Id.*

quarterly reports to local entities at the city or county level and remit any applicable occupancy tax to the locality.<sup>169</sup> This bill, however, was not passed into law.<sup>170</sup>

Not all of California's bills concerning alternative accommodations companies have died: California Senate Bill 761 successfully passed into law.<sup>171</sup> The law requires Internet platforms to notify hosts about the potential illegality of a listing each time the hosts creates a new rental listing.<sup>172</sup> The platform must require that the host "affirmatively acknowledge he or she has read the notice."<sup>173</sup> This law, which places some responsibility on the Internet platform, still requires hosts of alternative accommodations to locate, comprehend, and abide by applicable local laws. As illustrated in New York, placing the majority of the burden on hosts can result in fines, legal action, and evictions for the host, while the platform escapes liability. Thus, to avoid placing the entire burden of ensuring rental unit legality on hosts, the platform must take on some responsibility. Although promoting platforms to take on this responsibility in light of the current laws regulating alternative accommodations will be challenging, there are at least three approaches that society and lawmakers could use to generate the desired result.<sup>174</sup>

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<sup>169</sup> *Id.*

<sup>170</sup> *SB-593 Residential Units for Tourist or Transient Use: Transient Residential Hosting Platforms: History*, CAL. LEGIS. INFO., [https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=201520160SB593](https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160SB593) (last visited May 7, 2016) (stating that the bill "[d]ied on file").

<sup>171</sup> S.B. 2015-761, Reg. Sess. (Cal. 2015).

<sup>172</sup> CAL. BUS. & PROF. CODE §§ 22592, 22594 (West 2016). The platform is required to post the following notice:

If you are a tenant who is listing a room, home, condominium, or apartment, please refer to your rental contract or lease, or contact your landlord, prior to listing the property to determine whether your lease or contract contains restrictions that would limit your ability to list your room, home, condominium, or apartment. Listing your room, home, condominium, or apartment may be a violation of your lease or contract, and could result in legal action against you by your landlord, including possible eviction.

*Id.* § 22592.

<sup>173</sup> *Id.* § 22594.

<sup>174</sup> *See infra* Part III.

### III. SHIFTING LIABILITY FOR THE LEGALITY OF AIRBNB RENTALS FROM THE HOST TO THE PLATFORM

Airbnb has successfully and legally avoided liability for the legality of its rentals and the actions of its hosts through § 230 of the Communications Decency Act and through its own Terms of Service and disclaimer.<sup>175</sup> Thus, attempts to increase Airbnb's liability have, so far, not been effective.<sup>176</sup> The next sections present three possible approaches to shift the liability for the legality of Airbnb rentals from hosts to the company.<sup>177</sup> After presenting the three alternatives, a proposed best approach is presented.<sup>178</sup>

#### A. Three Possible Approaches

To motivate Airbnb to take on the responsibility of ensuring that its listings comply with state and local housing regulations, Congress could amend § 230.<sup>179</sup> Another approach to shift liability from hosts to Airbnb would be to leave current regulations intact and allow the principles of the sharing economy to effectuate change.<sup>180</sup> A third alternative would be to increase the level of social pressure applied to Airbnb until the company adopts additional monitoring procedures for its listings.<sup>181</sup>

##### 1. Amend § 230

Currently, § 230 of the Communications Decency Act provides interactive computer service providers with protection from liability for the actions and posts of users.<sup>182</sup> Modifying § 230 to narrow the range of immunity it provides to service providers could disturb service

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<sup>175</sup> See *supra* Sections II.A-B; *supra* Section I.C.

<sup>176</sup> See *supra* Subsection II.C.2.b.

<sup>177</sup> See *infra* Section III.A.

<sup>178</sup> See *infra* Section III.B.

<sup>179</sup> See *infra* Subsection III.A.1.

<sup>180</sup> See *infra* Subsection III.A.2.

<sup>181</sup> See *infra* Subsection III.A.3.

<sup>182</sup> 47 U.S.C. § 230 (2012).

providers' accepted reliance on § 230 immunity that has existed for approximately a decade.<sup>183</sup> However, if Congress were to amend § 230 to remove alternative accommodations platforms' protection from liability for hosts' violations of state and local regulations, the burden of ensuring rental unit legality would shift from hosts to the platform.<sup>184</sup>

With regard to § 230, a proposed approach to resolve the issue of Airbnb's immunity from liability for illegally operated rentals would be to add an exception for housing violations to the statute.<sup>185</sup> One scholar suggests Congress amend § 230 so that interactive computer service providers are no longer immune from liability for discriminatory information related to the sale or rental of a residence: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider, except for notices, statements, or advertisements with respect to the sale or rental of a dwelling."<sup>186</sup> The same amendment could also affect Airbnb's liability with reference to the legality of advertised rental units. Because Airbnb and other companies would be liable for the information contained in listings on their websites, these companies would no longer be immune if a unit violated state or local laws.<sup>187</sup> As a result, Airbnb would be motivated to develop ways to decrease the risk of liability for illegally operated units,<sup>188</sup> which would decrease the frequency of legal action brought against Airbnb hosts.<sup>189</sup>

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<sup>183</sup> See *Zaren v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (holding that § 230 immunized America Online from liability for harmful postings on its website).

<sup>184</sup> See Collins, *supra* note 90, at 1495.

<sup>185</sup> See *id.* (proposing an amendment to § 230 that would add an exception for discriminatory housing practices); Michael Todisco, Essay, *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 STAN. L. REV. ONLINE 121, 128 (2015).

<sup>186</sup> See Collins, *supra* note 90, at 1495.

<sup>187</sup> See *id.*; See *supra* Part II.C (describing various state and local regulations affecting Airbnb rentals).

<sup>188</sup> See Todisco, *supra* note 185, at 128.

<sup>189</sup> See *supra* Part II.

An amendment to § 230 that removes protection for violations of housing laws would prompt Airbnb to screen rentals for violations of state and local laws to ensure compliance.<sup>190</sup> This practice would be in line with Congress’s motivation behind § 230: to prompt interactive content providers to adopt proactive screening methods.<sup>191</sup> However, Congress intended for § 230 to grant broad protection to interactive computer service providers,<sup>192</sup> and § 230 already contains exceptions that allow courts to hold providers liable for violations of Federal criminal, intellectual property, and communications privacy laws.<sup>193</sup> Adding an additional exception to § 230 could not only pave the way for other exceptions, but an exception for housing laws could also begin to narrow the statute in a way that moves it outside of the scope of what Congress intended.

Another issue associated with adding an exception to § 230 is the risk that innovation and growth of the sharing economy and the Internet could be stifled.<sup>194</sup> In 2013, the estimated worth of the peer-to-peer rental sector of the sharing economy was valued at \$13 billion,<sup>195</sup> and Airbnb is currently valued at over \$10 billion.<sup>196</sup> While sharing economy companies are prospering, Airbnb hosts benefit from the sharing economy because they are able to make additional income through their rentals.<sup>197</sup> Additionally, consumers who use the sharing economy benefit from the

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<sup>190</sup> Cf. Collins, *supra* note 90, at 1499 (“In order to avoid liability, [interactive computer service providers] should employ simple screening programs that block advertisements containing any . . . ‘buzzwords.’”).

<sup>191</sup> See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (describing Congress’s intention to promote self-regulation).

<sup>192</sup> See 47 U.S.C. § 230 (2012).

<sup>193</sup> *Id.* § 230(e).

<sup>194</sup> See Kim, *supra* note 98, at 413; Feuerman, *supra* note 91, at 247 (noting that Internet platforms may offer less interaction with users if subjected to more liability); McNamara, *supra* note 92, at 166.

<sup>195</sup> RACHEL BOTSMAN, *WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION*, at xviii (2010).

<sup>196</sup> Zervas, Proserpio & Byers, *supra* note 1, at 2.

<sup>197</sup> *Id.* at 32 (noting the additional income flowing to individuals on the “supply side” of the sharing economy); Tomio Geron, *Airbnb and the Unstoppable Rise of the Sharing Economy*, FORBES (Jan. 23, 2013, 7:00 AM) (noting that Forbes estimated that sharing economy suppliers received \$3.5 billion in revenue in 2013).

increased opportunity to use products and services without owning them outright.<sup>198</sup> Therefore, a decrease in innovation due to an increase in the risk of liability for sharing economy platforms could detrimentally affect the economy and its users. One scholar, however, notes that increasing the risk of liability for Internet platforms could actually increase innovation because entrepreneurs “may develop technologies that assist other companies in minimizing the risk of civil liability.”<sup>199</sup>

## 2. *Leave Well Enough Alone*

A second proposed solution to shift liability from Airbnb hosts to the platform is to leave the laws protecting Airbnb unchanged.<sup>200</sup> This solution would not alter the current regulatory regime and, thus, not increase Airbnb’s and other Internet platforms’ liability for users’ actions. Due to the protection § 230 grants to interactive computer service providers, this approach would continue to leave consumers at the mercy of state and local regulations.<sup>201</sup>

Leaving current regulations unchanged would benefit Airbnb in that it would not be responsible for whether its rentals abide by state and local housing regulations.<sup>202</sup> Internet platforms’ risk of liability would remain constant, and these companies would not need to take on the time and cost of implementing additional mechanisms to monitor users’ activity.<sup>203</sup> The benefits that this approach provides to interactive computer service providers, however, run

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<sup>198</sup> ORSI, *supra* note 15, at 2, 4; Cohen & Zehngbot, *supra* note 19, at 6.

<sup>199</sup> Kim, *supra* note 98, at 424.

<sup>200</sup> See Todisco, *supra* note 185, at 128.

<sup>201</sup> See *supra* Part II; McNamara, *supra* note 92, at 168 (stating that under the current regulatory regime, “[t]he 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”). Airbnb will continue to “stand[] up for highly profitable, illegal businesses that make up a huge chunk of its corporate revenue[, rather than] stand[] up for average [hosts] who rent out their apartments from tie to time.” *Id.* at 161. This would “undermin[e] one of the central tenets of the sharing economy: trust itself.” *Id.* at 168.

<sup>202</sup> See *supra* Part II.

<sup>203</sup> See *supra* Subsection II.B.3 (noting the burden monitoring places on platforms and the measures required to increase monitoring).

against Airbnb’s principles of cultivating relationships of trust,<sup>204</sup> as well as Congress’s goal for § 230.<sup>205</sup>

As a company operating in the sharing economy, Airbnb relies on trusting relationships to further the success of its business.<sup>206</sup> If Airbnb continues to rely on § 230 to avoid liability when its hosts violate state and local housing regulations, its business may be negatively affected. Specifically, Airbnb hosts who have failed to locate, comprehend, and abide by state and local laws may begin to use Airbnb’s two-way review system as a means to express their dissatisfaction with a company that profits while its hosts face fines, legal action, and possible eviction.<sup>207</sup>

Airbnb’s reliance on § 230 to avoid monitoring the legality of rental units may also run against Congress’s intention for § 230. When Congress originally enacted § 230, its intention was to remove the disincentives of monitoring to encourage Internet platforms to develop and utilize measures to screen users’ activity.<sup>208</sup> Nevertheless, courts have not interpreted § 230 in a way that encourages Internet platforms to take on knowledge of users’ potentially illegal actions.<sup>209</sup> Further, courts have found that screening can be a burden on Internet platforms.<sup>210</sup> Therefore, the current regulatory environment may encourage Airbnb to continue to use § 230 as

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<sup>204</sup> See *supra* notes 66-70 and accompanying text (describing ways in which Airbnb attempts to establish trusting relationships between guests, hosts, and itself).

<sup>205</sup> See *supra* notes 89-90 and accompanying text (noting the intended purpose of § 230).

<sup>206</sup> See *supra* notes 66-70 and accompanying text.

<sup>207</sup> See *Trust & Safety*, *supra* note 3; *supra* Part II.

<sup>208</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997); Feuerman, *supra* note 91, at 233; Gerdes, *supra* note 91, at 675.

<sup>209</sup> See *Fair Hous. Council of San Fernando v. Roommates.com*, 521 F.3d 1157, 1165, 1167 (9th Cir. 2008) (holding an interactive computer service provider liable for becoming involved in users’ illegal activity).

<sup>210</sup> *Chi. Lawyers’ Comm. for Civil Rights Under the Law v. Craigslist*, 519 F.3d 666, 668 (7th Cir. 2008), as amended (May 2, 2008) (“[S]creening, though lawful, is hard.”).

protection from liability rather than implement screening procedures to assist hosts in navigating state and local laws.<sup>211</sup>

### 3. Apply Social Pressure

A third possible approach to shift liability for housing violations from hosts to Airbnb is to apply societal pressure.<sup>212</sup> The sharing economy has exposed gray areas in the law,<sup>213</sup> and its companies are taking advantage of this uncertainty.<sup>214</sup> Using social responsibility as a basis to motivate alternative accommodations companies could be more effective than traditional government regulations because sharing economy companies do not fit neatly into preexisting categories of regulation, which indicates that an alternative solution may be necessary.<sup>215</sup>

Increasing public awareness of the fact that sharing economy companies do not share in the risk of liability may result in action from both public and private entities. If state or local government officials continue to lobby for regulations that place greater liability on the Internet platform, the platform will likely get the message whether or not the lobbying is successful. For example, in California, Senate Bill 593 was unsuccessful in placing the burden of ensuring rental legality on Internet platforms facilitating alternative accommodations transactions.<sup>216</sup> With the threat of heightened risk of liability, Airbnb voiced its opposition to California Senate Bill 593,

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<sup>211</sup> *Id.*

<sup>212</sup> Todisco, *supra* note 185, at 128 (“Airbnb is an image-conscious company and might respond to public momentum.”).

<sup>213</sup> ORSI, *supra* note 15, at 13.

<sup>214</sup> *See supra* Sections II.A-B (describing how Internet platforms use § 230 to protect themselves from liability for users’ actions).

<sup>215</sup> *See* ORSI, *supra* note 15, at 13 (describing how traditional regulations did not foresee sharing economy transactions); Sundararajan, *supra* note 23 (“It’s a mistake to assume that just because technology provides ‘new leverage for old behaviors’ that we need old ways of regulating new things.”).

<sup>216</sup> *See* S.B. 2015-593, Reg. Sess. (Cal. 2015).

which the Committee on Transportation and Housing discussed during meetings.<sup>217</sup> Therefore, although the bill was unsuccessful, Airbnb was present and listening.<sup>218</sup>

In the area of grassroots lobbying, websites have already begun to launch attacks on Airbnb. For example, Share Better, an association united in opposition to Airbnb's presence in the sharing economy, claims that "Airbnb enables tenants to break the law and potentially violate their leases, . . . and it poses serious public safety concerns for Airbnb guests, hosts and their neighbors."<sup>219</sup> In addition to publicizing numerous Airbnb "horror stories,"<sup>220</sup> Share Better lists the elected officials and organizations that support the cause<sup>221</sup> and tracks recent media coverage of Airbnb.<sup>222</sup> Through its website Share Better provides the public with information needed to understand the role that Airbnb plays in regulating the legality of its rentals.<sup>223</sup>

Increased publicity of Airbnb's failure to take measures to decrease its hosts' housing violations could lead to changes in Airbnb's practices because as an alternative accommodations company in the sharing economy, Airbnb relies on its reputation to survive.<sup>224</sup> If public and private entities continue to pressure Airbnb through lobbying and educating the public on the effects of its practices, Airbnb may choose to implement measures that will decrease the prevalence of housing violations among its hosts, like those occurring in New York.<sup>225</sup>

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<sup>217</sup> CAL. S. COMM. ON TRANSP. & HOUS. REP., S. 2015-593, Reg. Sess. (Apr. 16, 2015).

<sup>218</sup> *See id.*

<sup>219</sup> SHARE BETTER, *supra* note 77.

<sup>220</sup> *Horror Stories*, *supra* note 4.

<sup>221</sup> *About Us*, SHARE BETTER, <http://www.sharebetter.org/about-us/> (last visited May 7, 2016).

<sup>222</sup> *Media Center*, SHARE BETTER, <http://www.sharebetter.org/media-center/> (last visited May 7, 2016).

<sup>223</sup> *About Us*, *supra* note 221.

<sup>224</sup> *See, e.g., Trust & Safety*, *supra* note 3; Sundararajan, *supra* note 23 ("In the sharing economy, reputation serves as the digital institution that protects buyers and prevents the market failure that economists and policy makers worry about.").

<sup>225</sup> *See supra* Subsection II.C.1.

For example, in 2010, Craigslist terminated the adult services classified section. Gerdes, *supra* note 91, at 653. Craigslist was not under any threat of liability if it had not terminated this section due to the protection of § 230, and it had not taken action to increase screening after forty state attorneys general contacted it. *Id.* at 653-54. However, the website chose to take this action due to increasing publicity after the death of one of its users. *Id.*

## B. Proposed Approach

Out of the three possible approaches to shifting the liability for Airbnb rental unit legality from hosts to the platform,<sup>226</sup> applying societal pressure on Airbnb until it accepts social responsibility for monitoring its units for housing violations is the best approach. As a corporation, Airbnb has the ability to make decisions based on its impact on society, and without being regulated to do so.<sup>227</sup> In the past, for example, Airbnb instituted its guest refund policy after initially failing to react when guests ransacked a host's rental property.<sup>228</sup> Airbnb also started offering free smoke and carbon monoxide detectors<sup>229</sup> after an American woman's death in Taiwan.<sup>230</sup> And, after initially refusing, Airbnb offered to reimburse a man for his stay and pay his medical bills after a dog bit him in an Argentinian Airbnb, due to the *New York Times* inquiring about the incident.<sup>231</sup> Therefore, it is not unlikely that Airbnb would respond positively to increased social pressure from public and private entities to take on the responsibility of monitoring the legality of its rental units.

Promoting Airbnb to monitor rental unit liability is feasible. As an intermediary Internet platform operating in the sharing economy, Airbnb is in a position to monitor the activities of its users through its size and capacity as a central location for listings.<sup>232</sup> This positioning allows

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<sup>226</sup> See *supra* Section III.A.

<sup>227</sup> ORSI, *supra* note 15, at 160 (“Despite the widespread belief that corporate boards must maximize shareholder returns, the fact is that, in most situations, corporate boards have broad discretion to make decisions based on many factors, including impacts on the community, the environment, their employees, as well as shareholder return.”).

<sup>228</sup> Brian Chesky, *Our Commitment to Trust & Safety*, AIRBNB, <http://blog.airbnb.com/our-commitment-to-trust-and-safety/> (last visited May 7, 2016); Kia Kokalitcheva, *Who's Liable When an Airbnb Stay or Uber Ride Ends Badly?*, FORTUNE (Nov. 10, 2015, 4:46 PM), <http://fortune.com/2015/11/10/sharing-economy-safety-liability/>.

<sup>229</sup> *Helping Hosts Make Their Homes Safer*, AIRBNB, <https://www.airbnb.com/home-safety> (last visited May 7, 2016).

<sup>230</sup> Kashmir Hill, *After a Woman Was Poisoned in an Airbnb the Company Started Giving Out Prevention Devices*, FUSION (Nov. 9, 2015, 6:24 PM), <http://fusion.net/story/229589/airbnb-death-safety-regulations/>.

<sup>231</sup> Ron Lieber, *Questions About Airbnb's Responsibility After Attack by Dog*, N.Y. TIMES (Apr. 10, 2015), [http://www.nytimes.com/2015/04/11/your-money/questions-about-airbnbs-responsibility-after-vicious-attack-by-dog.html?\\_r=0](http://www.nytimes.com/2015/04/11/your-money/questions-about-airbnbs-responsibility-after-vicious-attack-by-dog.html?_r=0).

<sup>232</sup> See Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 90 (2015).

Airbnb to internally weed out hosts who are operating in violation of regulations, but only if Airbnb adopts screening procedures for its listings.<sup>233</sup> The additional monitoring, however, will likely increase the Internet platform's expenses, and Airbnb will likely pass this cost on to its users.<sup>234</sup> The question to ask when the price of Airbnb's services increases is whether its users will pay more for additional screening measures to ensure that the units are legal or if the added costs will deteriorate the trusting relationships Airbnb strives to develop. The desired effect in adopting additional screening methods would be to increase trust between Airbnb and its users.

Adopting new screening procedures will place an additional burden on Airbnb<sup>235</sup> because the alternative accommodations company would need to hire new staff and the new process may delay posting of Airbnb listings.<sup>236</sup> Airbnb, however, will likely overcome this burden based on the fact that other alternative accommodations companies have.<sup>237</sup> Specifically, Onefinestay, which operates in 130 countries, compared to Airbnb's 190 countries, utilizes localized task forces to review and photograph each listing on its site.<sup>238</sup> Onefinestay also meets guests upon arrival to provide them with keys to their alternative accommodation.<sup>239</sup> If Onefinestay is able to use localized task forces to prepare its rentals, Airbnb should be able to remotely research local rules and regulations.

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<sup>233</sup> *See id.* (“[A]s scholars have documented, large, sophisticated firms can detect and root out internal legal violations—and otherwise alter employees’ and contractors’ behavior—far more easily than public authorities or outside private attorneys.”).

<sup>234</sup> *Chi. Lawyers’ Comm. for Civil Rights Under the Law v. Craigslist*, 519 F.3d 666, 669 (7th Cir. 2008), as amended (May 2, 2008) (discussing the likely costs of increased monitoring for an internet computer service provider and noting that the monitoring expenses would likely be passed on to users).

<sup>235</sup> *See id.* at 671; Kim, *supra* note 98, at 384.

<sup>236</sup> *See Craigslist*, 519 F.3d at 668-69 (describing the burdens Craigslist would face if it were to screen all of its users’ posts).

<sup>237</sup> *See, e.g., Our Service*, *supra* note 44.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

In addition to being feasible, the proposed solution would require no change to § 230 of the Communications Decency Act. Airbnb would still be liable as an interactive computer service provider under the Act, and, through the implementation of enhanced monitoring, Airbnb's risk of being held liable for a host operating in violation of housing regulations would increase.<sup>240</sup> Under § 230, if Airbnb were to become knowledgeable about state and local regulations affecting its units, it would have notice of any illegality and it would be at least partially responsible if a unit were to violate a regulation.<sup>241</sup> The proposed solution, however, would prompt Airbnb to ensure that its hosts operate legal rentals, which should avoid violations of the law and, as a result, avoid Airbnb's liability under state and local regulations.

A foreseeable limitation to the proposed approach is that society should pressure Airbnb to monitor listings for violations of state and local housing regulations, rather than of hosts' individual lease provisions. This limitation would decrease the burden placed on the Internet platform when it adopts additional monitoring practices because state and local housing regulations are more readily available and broadly applicable than individual leases.<sup>242</sup> Further, Airbnb hosts who violate the terms of their lease may face less severe repercussions than those who violate state and local laws. For example, in New York, a tenant who violated a provision of her lease that prohibited her from offering her apartment as a short-term rental was given the opportunity to cure her violation.<sup>243</sup> Conversely, a New York tenant who violated the state's Rent Stabilization Code was not offered the opportunity to cure the violation before eviction

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<sup>240</sup> Geron, *supra* note 197 (estimating the amount of revenue sharing economy suppliers received in 2013).

<sup>241</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (holding that notice is not enough to remove § 230 protections from an interactive computer service provider); *Fair Hous. Council of San Fernando v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (holding that an interactive computer service provider is not protected from liability under § 230 if the provider is partially responsible for illegal activity).

<sup>242</sup> The likely ease of locating state and local regulations is illustrated on Airbnb's website on which the company already posts housing regulations and zoning ordinances for forty-eight cities in the United States. *See Responsible Hosting*, *supra* note 70.

<sup>243</sup> *Gold Street Properties v. Freeman*, N.Y. L.J., July 2, 2014, at 1, 2, 5-6 (N.Y. Civ. Ct. June 16, 2014).

proceedings began.<sup>244</sup> As a result, monitoring for state and local violations rather than lease violations will likely be more important in building trusting relationships between Airbnb and its users due to the differential effects of the violations.

If Airbnb implements monitoring practices to ensure the legality of hosts' rentals, Airbnb hosts whose residences are subject to provisions that prohibit temporary subleasing or commercial activity in the residence would no longer be able to host. Consequently, these hosts would no longer share in the revenue that Airbnb users receive.<sup>245</sup> However, these individuals would benefit from no longer being allowed to host Airbnb rentals in that they would avoid violating applicable state or local housing regulations.<sup>246</sup> Thus, in correspondence with a foundational principle of the sharing economy, the proposed solution would increase the level of trust between Airbnb users and the platform because users could rest assured that their rental unit is not in violation of the law or that they avoided violating the law as a result of being weeded out by Airbnb's monitoring procedures.

#### CONCLUSION

Airbnb's current measures to ensure trust and safety for hosts are not enough to protect hosts from issues involving the legality of their Airbnb rental because these measures disclaim Airbnb from liability for users' actions and do not ensure that rentals comply with state and local housing regulations.<sup>247</sup> Under § 230 of the Communications Decency Act, Airbnb is not liable for the actions of its hosts because the Act protects interactive computer service providers from liability to promote the growth of the Internet.<sup>248</sup> Because Airbnb is not liable for its hosts'

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<sup>244</sup> Brookford, LLC v. Penraat, 8 N.Y.S.3d 859, 872-73 (N.Y. Sup. Ct 2014).

<sup>245</sup> Geron, *supra* note 197.

<sup>246</sup> *See supra* Section II.C.

<sup>247</sup> *See Lines, supra* note 165, at 1169.

<sup>248</sup> 47 U.S.C. § 230 (2012).

violations of housing laws, state and local governments target the hosts to enforce the legality of Airbnb units.<sup>249</sup> Although different alternatives exist to shift the burden of ensuring the legality of Airbnb units from hosts to the platform, the most promising option is to apply social pressure to Airbnb until it adopts screening procedures that monitor and ensure compliance with the state and local regulations for each listing.<sup>250</sup>

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<sup>249</sup> *See supra* Section II.C.

<sup>250</sup> *See supra* Part III.