



Perspective

Regulation and the Sharing Economy

BY ROBERTA A. KAPLAN

Online services and smartphone applications create new ways for people to connect and share goods and services over the Internet, empowering users with more convenient choices and income opportunities. Sharing apps and websites act like “virtual matchmakers” by facilitating relationships that otherwise might be too costly or burdensome to arrange. The “sharing economy” has not only created completely new marketplaces for goods and services, but has invented radically new ways to deliver traditional goods and services.

Companies like Hailo or Uber, for example, allow users to hail cabs or private cars with their smartphones, while companies like Airbnb allow

people to arrange travel accommodations by interfacing with others online. With 225,000 total users in New York City alone, Airbnb generates over \$600 million in economic activity per year in New York City. Recent financing transactions have valued Airbnb and Uber at approximately \$10 billion and \$18 billion, respectively. Demonstrating the surge of economic energy and ingenuity in this area, similar sharing apps have been developed for catering (Catercow), home improvement (HouseFix), and even dog walking (Swifto), to name just a few.

Although the full impact of these new business models is hard to measure at this point, their economic benefits are undeniable. Unfortunately, however, sharing apps and websites have drawn the ire of incumbent competitors occupying more traditional economic roles in each sector (e.g., hired vehicle services and hotel companies). Although incumbents tend to portray disruptive innovation as “evading” established systems of regulation, this is true only in the sense that the automobile “evaded” the horse tax and saddle regulations.

More often, innovative technologies present new and fundamentally different circumstances that were unforeseen at the time of the original regulatory enactment. As Margaret Wentz recently noted, “Governments, which are responsible for constructing all these regulations, don’t know what’s hit them.”¹

If left unchecked, however, overregulation and over-litigation for the sake of incumbent competitors’ short-term, parochial interests may stifle the “sharing economy” and deprive the public of its obvious benefits. Litigation involving two of my clients, Hailo and Airbnb, illustrate the challenges and opportunities faced by these new business models.

In the case of Hailo, an incumbent firm went to court to try to suppress competition from sharing apps, even when local regulators had opted for a pro-innovation approach. The New York City’s Taxi & Limousine Commission (TLC) approved a year-long pilot program to evaluate electronic hail applications that can be used to request taxi service. The TLC recognized the potential public benefits of e-hail apps, in light of the fact that

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taxi drivers spend 40 percent of their shifts without a fare.

The day before the pilot program's start, however, livery car services sued the TLC in an attempt to block the pilot program. Among other things, they alleged that e-hailing constituted invidious discrimination against the elderly because they were less likely to own smartphones (contrary to data showing 25 percent of e-hails during the first three months came from those 65 and older). Although the black cars lost in the trial court, after the TLC formally commenced the e-hail pilot program, the black cars obtained another temporary restraining order, which was later lifted. The legal maneuvering delayed the pilot program's start several months, depriving the public of the benefits of e-hailing and interfering with the TLC's efforts to encourage innovation.

In the case of Airbnb, local regulators claimed that older laws and regulations, enacted well before the new technology existed, prohibit or severely limit its services. The New York Attorney General recently served Airbnb with a subpoena demanding that it turn over virtually all information about Airbnb's New York hosts from 2010 to the present in order to aid its investigation of violations of certain zoning laws and hotel tax provisions.

Airbnb moved to quash the subpoena, arguing that it was overbroad. The court agreed, concluding that "the subpoena at issue, as drafted, seeks materials that are irrelevant to the inquiry at hand and accordingly, must be quashed." The next

day, the attorney general issued a new subpoena, and within a week the parties reached an agreement regarding Airbnb's compliance. The agreement permits Airbnb to produce anonymized data and to subsequently provide more specific information identified by the attorney general as subject to further investigation. The agreement also requires Airbnb to display disclaimers to its users regarding hotel taxes and other rules.

New technologies should not be banned outright simply because they cannot be neatly shoehorned into traditional business or regulatory models.

Because the threat of enforcement actions can have a chilling effect on start-ups and their users, state and local government officials in New York and elsewhere should encourage the growth of the sharing economy, as other governments already have. To give one prominent example, given the lack of available hotel rooms in Rio de Janeiro for this year's World Cup, the Brazilian government actually encouraged people to use Airbnb.

As with any other industry, there is clearly a legitimate role to be played by reasonable regulation of the business models that make up the sharing economy. As Airbnb's CEO Brian Chesky¹ recently commented at the Aspen Ideas Festival, "We do want to

play by the rules." The critical point is that new technologies should not be banned outright simply because they cannot be neatly shoehorned into traditional business or regulatory models.

One thing is clear: the sharing economy is here to stay. As Wenté observed, "These new businesses ... are messy, unfair and immensely destructive—and also wildly popular."

Given that inevitability, both judges and policymakers will increasingly be called upon to apply old laws to these new technologies. Whereas the apocryphal Ned Ludd took the more direct approach of smashing machines during the rise of the mechanical textile industry, today's Luddites have tried to do the same thing, but this time using injunctions, fines and other legal measures. In resolving such disputes, courts and regulators should view skeptically the self-interested arguments of incumbent competitors and consider the enormous benefits and efficiencies of sharing to the public and consumers.

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1. Margaret Wenté, *Are Airbnb and Uber Changing the World?*, *The Globe and Mail* (July 5, 2014), <http://www.theglobeandmail.com/globe-debate/are-airbnb-and-uber-changing-the-world/article19453855/>.